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Neglecting Nationalism

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ARTICLES

NEGLECTING NATIONALISM

*Gil Seinfeld**

ABSTRACT

Federalism is a system of government that calls for the division of power between a central authority and member states. It is designed to secure benefits that flow from centralization and from devolution, as well as benefits that accrue from a simultaneous commitment to both. A student of modern American federalism, however, might have a very different impression, for significant swaths of the case law and scholarly commentary on the subject neglect the centralizing, nationalist side of the federal balance. This claim may come as a surprise, since it is obviously the case that our national government has become immensely powerful over the course of United States history, to the point that it is difficult to identify areas of human activity that the national government cannot regulate. But the social and doctrinal developments that helped to usher in the empowerment of our national government have not been accompanied by the development of a constitutional theory of federalism that takes nationalism properly into account. To the contrary, nationalism is routinely treated as something external to our constitutional federalism or, indeed, something antagonistic to it. Informed observers, both on the courts and in the academy, often write as if federalism and devolution were synonymous, and as if our federal system were designed to capture only the benefits associated with state empowerment. The textual foundations for, and functional goals associated with, the nationalist side of the enterprise are infrequently discussed and seriously undertheorized, and, as a result, nationalism's role in our federal scheme is poorly understood. This Article endeavors to document our neglect of nationalism, to consider its causes, and to speculate about its consequences.

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INTRODUCTION

If you ask the average law student—or lawyer, or judge, or legal scholar—for a quick account of what “federalism” is, you are likely to get “states’ rights” (or something very much like it) as an answer. Federalism, most would say, means a commitment to devolution; it is about state autonomy, and it is about local control. It is a scheme of government that frowns on excessive empowerment of a central authority and includes protections to guard against national overreach. This conception of federalism appears frequently in our case law, it is echoed in scholarly commentary, and it is taught in our law schools. It is among the most conventional of conventions in our legal culture. And it is wrong.

I suspect that, on just a moment’s reflection—and despite the way we tend to talk about it—most every informed observer would agree: Federalism and devolution are not the same thing; the former is an accommodation between the latter and the instinct to centralize. To be sure, federalism entails a commitment to states’ rights, but no more, necessarily, than it entails a commitment to national empowerment. Thus, the standard usage of the term “federalism”—in both our legal and political discourse—is misleading. It neglects the nationalist side of our constitutional order, thus ignoring half of what makes federal systems federal.

This is no mere terminological tic. Rather, it reflects an approach toward our federalism that drives reasoning and argument across a range of cases and scholarly work. In other words, this way of using the term “federalism” reflects a way of *thinking* about what federalism is—one that has real purchase in our legal culture.

This claim must surely seem odd at first blush. Our national government is now immensely powerful, and our history has been marked by a steady

push—one that accelerated rapidly over the course of the twentieth century—in the direction of centralization. Moreover, although many hold the view that our Constitution, properly understood, does not confer a general police power on the national government, most everyone also agrees that prevailing doctrine enables the federal government to regulate virtually any field of human activity. Thus, one could be forgiven for reacting skeptically to the claim that our legal culture is neglectful of nationalism in any meaningful way.

I have no wish to lose my audience to this skepticism before I have had a chance even to begin, so I invite you to perform the following thought experiment. Ask yourself, first, what values our federalism is designed to serve. Then ask what sources you might turn to in support of your answer. For those steeped in the relevant case law and academic commentary, the answers roll off the tongue. Federalism can help to enhance individual liberty; it provides opportunities for citizens to participate in governance; it carries the promise of tailoring policies to accommodate the preferences of a diverse citizenry; and it offers opportunities for policy experimentation with diminished risk that the effects of a failed experiment will ripple nationwide. The supportive sources are equally familiar, with Justice O'Connor's majority opinion in *Gregory v. Ashcroft*,¹ Michael McConnell's review essay *Federalism: Evaluating the Founders' Design*,² and some others³ at the heart of the canon.

Despite the reflexiveness with which students of federalism could recite this familiar litany, I think it clear, here too, that the litany is just wrong—or perhaps, in this case, just seriously misleading. For this is an account of benefits that might flow from *devolution*; and federalism, as noted above, is about more.⁴ It is an arrangement that calls for empowering states *and* for

¹ 501 U.S. 452, 458 (1991) (“This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.”).

² Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491–1511 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)).

³ *E.g.*, DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 75–106 (1995); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 351.

⁴ My point is different from the one about federalism and decentralization famously advanced by Professors Feeley and Rubin. Feeley and Rubin contend that many of the benefits traditionally associated with federalism might just as easily be secured (and, indeed, are probably better secured) through a strategy of managerial decentralization imposed by a central planner. See MALCOLM M.

empowering a central authority. Yet the benefits associated with the latter are essentially excluded from the standard picture.⁵

This tendency to conflate federalism with devolution is an omnipresent feature of our legal discourse. Indeed, once you become aware of the practice, it becomes difficult to miss, as it appears time and again across a wide range of sources. (I will point to many examples in this Article.) Even so, it remains tempting to dismiss this observation as more a semantic quibble than a truly substantive beef. For surely the judges and commentators who present these familiar arguments are well aware that federal systems, including our own, value both devolution *and* centralization. The formulation may be imprecise—even sloppy—but that does not mean our legal discourse neglects nationalism in a meaningful way.

Let us return, then, to our thought experiment and ask a parallel set of questions about nationalism. What values do the centralizing, nationalist features of our federal architecture serve? And what texts do informed commentators treat as stock citations for the standard answers? Answering the first question is more difficult than it should be; answering the second is probably impossible.

On reflection, most of us would cite uniform regulation—the enactment of national law in the interest of avoiding races to the bottom, externalities, and the like—as one of the key virtues of political confederation.⁶ And we might argue, too, that individual rights—especially those of racial, political, and other minority groups—will be better protected in a larger polity comprising overlapping interest groups with cross-cutting priorities and commitments.⁷ But even if judges and commentators would converge on

FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* 20–29 (2008). I take no position here on whether Feeley and Rubin are right to argue that one does not need “true federalism” (which they define as a system in which member states enjoy “definitive rights against the center”) to secure the benefits in question. *Id.* at 20, 22. My point is just that, even if these benefits *are* properly thought of as the benefits of “federalism,” they still represent only half the picture.

5 Of the four benefits included in the standard list—protection of liberty, civic engagement, broader satisfaction of policy preferences, and increased experimentation—the latter three plainly flow from devolving power from a central authority to member states. Only the claim about the preservation of individual liberty relates to the nationalist side of the picture, since the point is that simultaneously empowering multiple levels of government carries the promise of animating a natural check against abuse by any one. Benefits that might flow from nationalism alone are not mentioned.

6 See Abbe R. Gluck, *Nationalism as the New Federalism (and Federalism as the New Nationalism): A Complementary Account (and Some Challenges) to the Nationalist School*, 59 ST. LOUIS U. L.J. 1045, 1057 (2015) (noting that “nationalism seems associated mostly with a single value: uniformity”).

7 See SHAPIRO, *supra* note 3, at 50–56. Commentators may be more attracted to this particular trope

these accounts of the values served by political union, I think it uncontroversial to say that the nationalist brief does not occupy a place in our legal discourse that is anything like the one enjoyed by its devolutionary counterpart.⁸ The particulars of the nationalist account do not leap to mind as do the details of the standard (devolution-focused) model, and there simply are not standard sources that serve as a convenient shorthand for the relevant set of ideas.⁹

In these ways and others, nationalism is a neglected concept in our constitutional discourse. It is infrequently discussed and seriously undertheorized, and its role in our scheme of constitutional federalism is poorly understood.¹⁰ This Article is an effort to document this neglect, consider its causes, and speculate about its consequences.

My analysis proceeds in three Parts. Part I focuses on a species of neglect I label “denial.” It canvasses sources that either disregard or seriously marginalize the nationalist features and aims of our federal system. Part II focuses on what I call “complacency.” Complacency is reflected in the

than is warranted by the facts. See Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 1007–09 (2004) (noting that “[e]xperience has not always vindicated th[e] view” that “an ‘extended republic’ . . . is less likely to use governmental power against minority groups than individual state governments are” (footnote omitted)).

⁸ See Gluck, *supra* note 6, at 1057 (“We have elaborated theories of ‘Our Federalism,’ but have no theory of ‘Our Nationalism’” (footnote omitted) (citing *Younger v. Harris*, 401 U.S. 37, 43–45 (1971))).

⁹ The most fully developed account can be found in SHAPIRO, *supra* note 3, at 34–57. Madison’s *Federalist No. 10*, of course, famously expounds on the relationship between an extended republic and the protection of political minorities. THE FEDERALIST NO. 10, at 83–84 (James Madison) (Clinton Rossiter ed., 1961). The virtues of nationalism are also explored briefly in Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 405–09 (1997), and Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1499–1500 (1994).

¹⁰ There have been two relatively recent symposia—one published in the *Yale Law Journal*, the other in the *Saint Louis University Law Journal*—developing what Dean Gerken has labeled the “nationalist school of federalism.” See Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1890 (2014) (internal quotation marks omitted) [hereinafter Gerken, *The New Nationalism*]; Heather K. Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 ST. LOUIS U. L.J. 997, 997 (2015) (internal quotation marks omitted) [hereinafter Gerken, *Détente*]. These scholarly efforts do not undermine my claims that nationalism is “infrequently discussed,” “seriously undertheorized,” and “poorly understood.” As one contributor to the latter symposium observed, the term “nationalism,” as it is deployed in this body of work, is more of an empty label than a concept with discernable content capable of aiding analysis. See Gluck, *supra* note 6, at 1056, 1059 (explaining that “what [members of this school] mean by ‘nationalism’ remains unclear,” as they have not yet explained “how the ‘nationalism’ aspect of their account adds to or changes the stakes of the benefits that we already understood to be generated by the states even acting outside of a national framework”); *id.* at 1059 (“[I]t remains difficult for me to see, apart from the use of the new label ‘nationalism’ instead of ‘federalism,’ how the prescription for good democracy [advanced by the “new nationalists”] . . . is all that different from [a] traditional federalism account.”).

instinct (made manifest in important pockets of scholarly literature) to explore and celebrate different means of promoting state power—all in the name of “good federalism”—while declining to consider the consequences of such empowerment for national law, national policy, and national institutions. Complacent commentary does not deny the nationalist commitments of our federal system; it is simply unconcerned about them. Part III offers some tentative thoughts about the consequences of this neglect.

I. DENIAL

In this Part, I examine sources that are in denial about the nationalism of our constitutional order. It is denial of a particular sort. Thus, I am not concerned (at least not here) with the modest shading or short-changing of constitutional values that participants in legal discourse often feel is characteristic of their adversaries’ position. (Though that, too, might reasonably be characterized as a species of neglect.) It is not my goal to show that courts and commentators sometimes take the interests in nationalism and devolution, place them on opposite sides of the scale, and fail to get the balance right. What I want to show, instead, is that, in discussions of constitutional federalism, nationalism often does not make its way onto the scale at all. It is not treated as part of the constitutional calculus, and, as a result, a host of claims that should simply be unsayable in the context of serious discourse about American federalism has made its way into the mainstream, routinely unquestioned and unchallenged.

Section I.A documents this phenomenon as it appears in the judicial and scholarly discourse relating to statutory interpretation in cases with significant federalism implications. That discourse, we will see, is marked by a series of errors and oddities sounding generally in a failure to give nationalism its due. We will see (in connection with these materials and others I explore later on) that authoritative sources routinely treat the term “federalism” as if it were synonymous with “devolution” and proceed from the apparent premise that while the expansion of national power might threaten constitutional values, the curtailment or obstruction of that power generally cannot. In so doing, these sources effectively erase the nationalist side of our federal scheme.

Section I.B examines a distinct species of denial—one that focuses on nationalist constitutional text. It explores sources that offer broadly-gauged accounts of what the Constitution requires when it comes to the division of power between the national government and the states, but that, in so doing, either seriously marginalize or completely ignore foundational nationalist

features of our Constitution. This commentary, we will see, treats several constitutional provisions that have far-reaching implications for the allocation of power between the federal government and the states (most prominently the Fourteenth, Sixteenth, and Seventeenth Amendments) as if they provided virtually no insight into the basic shape of our federal system.

A. *The Presumption Against Preemption and Its Cousins: Neglect for Nationalism in the Interpretation of Federal Statutes*

Since the late 1940s, the Supreme Court has developed and deployed an array of rules governing the interpretation of federal statutes in cases implicating the balance of power between the federal government and the states. These rules direct courts to eschew interpretations of federal law that threaten significant intrusions on state power unless the evidence of congressional intent so to intrude is especially compelling. Thus, the Supreme Court has established a general presumption against federal preemption of state law;¹¹ it has directed courts to decline to enforce conditions on states' receipt of federal funds unless Congress has specified those conditions "unambiguously" and "with a clear voice;"¹² it has determined that federal statutes ought not to be construed to abrogate state sovereign immunity unless Congress has made its intent to do so "unmistakably clear in the language of the statute;"¹³ and it has directed courts to resist interpretations of federal law that authorize particularly "intrusive" exercises of federal power—interpretations that would affect "fundamental" features of state sovereignty—unless they are "absolutely certain that Congress intended such an exercise."¹⁴

The standard justification for these rules is straightforward: state autonomy is an important constitutional value, and these interpretive devices help to promote it. The rules aim to preserve the "substantial sovereign

¹¹ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress."). Whether this presumption is taken seriously is subject to debate. See generally Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313 (2004); Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967 (2002).

¹² *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

¹³ *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

¹⁴ *Gregory v. Ashcroft*, 501 U.S. 452, 460, 464 (1991). For an overview of these "federalism canons," see William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 607–08, 619–25 (1992).

authority”¹⁵ of the states by assuring that courts do not “give the state-displacing weight of federal law to mere congressional ambiguity.”¹⁶ At first blush, this looks like fairly benign stuff. It is not uncommon for the Supreme Court to craft rules of statutory interpretation with an eye to safeguarding important constitutional values,¹⁷ and it seems uncontroversial to say that state autonomy qualifies as such.¹⁸ Moreover, the presumption/clear statement approach seems a relatively modest way to bolster state autonomy, at least when compared to approaches that rely on the Supreme Court to craft bright-line rules of constitutional law demarcating the outer limits of congressional power.¹⁹ In theory, at least, these interpretive rules do nothing to prevent an attentive Congress from advancing its vision of the proper allocation of power between the federal government and the states.²⁰ Thus, one could be forgiven for presuming that the case law establishing and developing these rules (together with the attendant scholarly commentary) is an unlikely place in which to find aggressively tendentious thinking about the contours of our federalism.

That turns out to be wrong. To see how and why this is so, I am going to turn my attention to two sources: the Supreme Court’s frequently-cited decision in *Gregory v. Ashcroft*, and the academic literature relating to the presumption against preemption, especially the work of Professor Ernest Young. *Gregory* contains the Court’s most sustained and oft-quoted effort to defend the suite of interpretive practices outlined above, while Young is an especially ardent defender of a robust presumption against federal

¹⁵ *Gregory*, 501 U.S. at 457.

¹⁶ *Id.* at 464 (emphasis omitted) (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25 (2d ed. 1988)); see also Peter M. Shane, *Federalism’s “Old Deal”: What’s Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201, 206–07 n.37 (2000) (explaining that these rules “instruct[] Congress that state autonomy values are of sufficient importance that the Court will not infer that they have been superseded absent evidence—in the form of a plain statutory statement—that Congress has actually deliberated on the relevant state interests and the reasons for superseding them”).

¹⁷ See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 459 (1989).

¹⁸ *But see* FEELEY & RUBIN, *supra* note 4 (arguing that federalism is vestigial in the modern United States).

¹⁹ See, e.g., Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 126 (2004) (discussing the virtues of softer “resistance norms” as opposed to “invalidation norms”). *But see* Eskridge & Frickey, *supra* note 14, at 632–45 (exploring a range of concerns relating to the Court’s deployment of federalism-based clear statement rules).

²⁰ I say “in theory” because there is reason to doubt whether Congress is responsive to the Court’s preemption decisions. See Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1605 (2007); see also Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 942–46 (2013) (presenting a mixed bag of evidence relating to statutory drafters’ familiarity with the federalism canons and noting, in particular, that “[e]vidence of a feedback loop for clear statement rules . . . was almost entirely absent”).

preemption of state law. These sources defend the relevant interpretive practices by reference to the purposes served by our establishment of a federal system of government, but they are in denial when it comes to the nationalist side of that system. More specifically, these sources either ignore the nationalizing features and aims of our constitutional structure or reduce them to an afterthought.

I should emphasize, at the outset, that despite what these sources *say*—despite their persistent conflation of “federalism” and “devolution” and their failure to treat nationalism as an active and important constitutional value—I do not believe the courts and commentators whose work I survey here would deny that nationalism is, in fact, an important (indeed, a definitional) feature of any federal system. What these sources mean to communicate, I think, is that the state-autonomy-promoting canons are attractive because they represent our best hope, under a contingent set of conditions that happen to obtain in the modern United States, for mediating between the competing impulses that characterize federal schemes. But if that is right, then the heart and soul of the argument—the account of what it is about current conditions that makes it necessary to privilege the devolutionary instinct over the centralizing one—is simply missing.²¹ It is neglectful of nationalism no matter how you slice it.

1. “An Extraordinary Power”

Gregory v. Ashcroft presented the question of whether a provision of the Missouri Constitution requiring state court judges to retire at age seventy violated the federal Age Discrimination in Employment Act (the “ADEA”).²² The Court answered this question in the negative, reasoning that (a) absent a clear statement from Congress, federal statutes ought not to be construed

²¹ In his article *Making Federalism Doctrine*, Professor Young readily acknowledges that “federalism” refers to a system of government that calls for balance between the interests in centralization and devolution. See Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1848–50 (2005). He takes pains to explain why, under modern conditions, it is appropriate for courts to craft legal doctrine with an eye to shoring up the devolutionary side of things. See *id.* at 1783–85. So, while we will see that much of Professor Young’s work is neglectful in the ways detailed in this Part, some of it is emphatically not. We will see in Section I.B, however, that the analysis underlying Professor Young’s conclusion that our federal system has fallen out of balance is itself neglectful of nationalism, albeit in a way that is different from the neglect reflected in the collapsing of federalism and devolution into one.

²² *Gregory v. Ashcroft*, 501 U.S. 452, 455 (1991). The case also raised the question whether the mandatory retirement age violated the Equal Protection Clause of the United States Constitution. The Court said no. *Id.* at 470–73.

to invade core aspects of state sovereignty, (b) the ADEA lacked such a clear statement, and so (c) it should not be read to apply to state laws that set qualifications for state judges.²³

The Court grounded its analysis in a series of grand claims about the design of our federal system. First, it explained that our Constitution establishes a system of dual sovereignty pursuant to which states enjoy “separate and independent autonomy”²⁴ and powers that are “numerous and indefinite.”²⁵ It then emphasized that the preservation of state power and autonomy is essential to securing the myriad benefits associated with the adoption of a federal system, foremost among which is the protection for individual liberty that flows from having two independent and “credible” levels of government ready and able to check one another.²⁶

The Court then turned to the challenging question of how to preserve the credibility of the states as a check on national power in the context of a system that designates federal law supreme. Justice O’Connor explained:

The Federal Government holds a decided advantage in th[e] delicate balance [between state and federal power]: the Supremacy Clause. As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly.²⁷

I want to focus on the Court’s claim that it is somehow “extraordinary” for Congress to “impose its will on the States” or to “legislate in areas traditionally regulated by the States,” as this intuition appears to provide crucial support for the clear statement rule the Court applied. It is one thing, the Court seems to be saying, to rely on inference and implication in the course of concluding that Congress has done something mundane, but it is quite another to do so where extraordinary measures are at issue. In that context, only a clear statement will do.

But just what does the Court mean when it tells us that such exercises of congressional power are “extraordinary . . . in a federalist system?” And, whatever the precise contours of this claim, what, exactly, is the basis for it? What makes exercise of the power in question “extraordinary?”

²³ *Id.* at 470.

²⁴ *Id.* at 457 (quoting *Texas v. White*, 74 U.S. 700, 725 (1868)).

²⁵ *Id.* at 458 (quoting *THE FEDERALIST* NO. 45, *supra* note 9, at 292 (James Madison)). This is in contrast to the “few and defined” powers bestowed upon the national government. *Id.*

²⁶ *Id.* at 458–59.

²⁷ *Id.* at 460 (internal citation omitted) (citing U.S. CONST., art. VI, cl. 2).

It is certainly not unusual, in the context of a federal scheme of government, for national law to trump the law of member states. To the contrary, the Court was closer to the mark, more recently, when it quoted Alexander Hamilton's observation that the Supremacy Clause (which lies at the root of federal law's capacity to displace state law) "only declares a truth, which flows immediately and necessarily from the institution of a Federal Government."²⁸ Thus, it seems doubtful that the Court meant to intimate that this feature of our constitutional system is "extraordinary" in the sense of being *unlike* the powers typically found in other federal systems.

It is tempting to say that the passage means to classify as "extraordinary" only those exercises of federal power that encroach upon areas that have traditionally been regulated by the states or, perhaps, exercises of federal power that encroach on especially sensitive sovereign functions. But this does not seem like the most natural reading of the relevant language. Read in its entirety, and especially in light of (1) the breadth of the interpretive rules the Court justifies by reference to this consideration,²⁹ and (2) the immediately preceding reference to the Supremacy Clause, the passage seems to signal that federal supremacy as a whole—not just some particularly aggressive manifestations of it—is somehow extraordinary (and extraordinarily worrisome). The point, it seems to me, is simply that supremacy and the displacement of state law are a big deal, and so courts ought to handle them with care.

It is when we view *Gregory* in just this light, however, that the Court's denial of nationalism comes into focus. For the notion that we ought to think of national supremacy as "extraordinary" in this way, and that we ought therefore to presume that Congress does not deploy it lightly, makes sense only if we come to the interpretive exercise with firm priors about the constitutionally preferred distribution of authority between the federal government and the states. One needs some baseline against which to assess which exercises of congressional power are "extraordinary" (and ought therefore to be deployed gingerly) and which ones can move forward without much wringing of hands. For *Gregory*'s account to have purchase, then, one

²⁸ *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378, 1383 (2015) (quoting THE FEDERALIST NO. 33, *supra* note 9, at 205 (Alexander Hamilton)).

²⁹ *See Gregory*, 501 U.S. at 460–61 (noting that application of the ADEA on the facts presented would interfere with Missouri's fundamental sovereign authority to "defin[e] their constitutional officers," but also classifying any legislation that "affect[s] the federal balance" as "sensitive" and, thus, meriting application of a clear statement rule (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989))).

must enter the process of constitutional interpretation resolved to understand (at least some) nationalist features of constitutional text in light of a pre-conceived vision of the federal structure—one that places a thumb on the scale in favor of preserving state power and autonomy.

This is all well and good, up to a point. It is perfectly ordinary for conceptions of constitutional structure—including, of course, ideas relating to state power and sovereignty—to drive the interpretation of ambiguous constitutional text.³⁰ Indeed, it seems inevitable that features of our constitutional federalism to which the text speaks only obliquely will be affirmed or denied by reference to (among other things) structural considerations. But one cannot sensibly make this move, I think, with respect to the contours of federal supremacy, for the Supremacy Clause is so obviously central to the Constitution's allocation of power between the federal government and the states. To craft a theory of federalism without it is to do Hamlet without the Prince; and to then rely on such a theory to set limits on federal supremacy itself is to run the analysis in reverse.

This is not the only way in which the *Gregory* opinion is neglectful of nationalism. Here we confront our first example of courts' and commentators' tendency to conflate "federalism" with the preservation of state power. *Gregory* does so by describing the "numerous advantages"³¹ associated with the adoption of a federal system in the following terms:

This federal[] structure . . . assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

. . . [It also provides] a check on abuses of government power. . . . Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.³²

As noted earlier,³³ the problem with this account is not that it's inaccurate; the problem is that it's incomplete. The "advantages" identified in this

³⁰ See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 548–58 (2012) (Roberts, C.J.) (construing the scope of federal power under the Commerce Clause in light of the principle that the federal government does not enjoy a general police power).

³¹ *Gregory*, 501 U.S. at 458.

³² *Id.*

³³ See *supra* text accompanying notes 1–5.

passage are those that might follow from the decision to devolve power from a central authority to member states;³⁴ those associated with the centralization of power—the reasons we have a truly federal system as opposed to a loosely bound collective like the one that prevailed under the Articles of Confederation—are simply ignored.

In this respect, *Gregory's* account of the advantages associated with federalism is rather ironic. A reader of the passage quoted above could be forgiven for deducing that the establishment of our federal system marked a transition from a unitary system of government to one characterized by greater autonomy for sub-national entities. Of course the opposite is true. The transition from the Articles of Confederation to the scheme of government laid out in our Constitution was an exercise in consolidation and nationalism, with the establishment of a new, more powerful, central government as its centerpiece. *Gregory* obscures this point entirely.

I am quite sure that all of the Justices in the *Gregory* majority were aware of the two-way nature of federal systems, including our own. And I am equally confident that those Justices could identify the key benefits associated with centralization and would acknowledge (though it might take a bit of cajoling) that our Constitution endeavors to secure them. Moreover, it could be argued that there was little reason for the *Gregory* Court to explore the benefits associated with the nationalist side of our federal scheme, given that the anxiety piqued by the statute under review sounded in federal meddling in the internal affairs of state government. This is all by way of saying that before we make hay of *Gregory's* unbalanced account of what federalism is for, it is worth pausing to consider context and to assess whether this is an instance of sloppy exposition rather than constitutional confusion (or, worse, misdirection).

But I do not think we can let the Court off the hook that easily. For even if it is true that application of the ADEA to state court judges raises concerns that sound in state autonomy, the constitutional anxiety reverses field the moment we determine to rig the interpretive exercise in the interest of preserving regulatory space for the states. What are the hazards of deploying a rule that might hinder congressional efforts to address social and economic challenges that are national in scope? What are the potential advantages of authorizing Congress to set aside states' autonomy from time to time—even, perhaps, in connection with the internal organization of state government? The *Gregory* Court does not say, and, perhaps more important, it does not even acknowledge that these are questions of constitutional moment. The nationalist side of the federal balance is thus rendered invisible.

34 See *supra* note 5.

2. “Why We Care About Federalism in the First Place”

The academic literature pertaining to these federalism-based interpretive rules neglects nationalism in similar ways.³⁵ For example, it is not at all uncommon for observers who purport to be enumerating the benefits associated with the adoption of a federal system to list only the benefits associated with devolution. Many of the commentators who make this move treat the above-quoted passage from *Gregory* as an authoritative account of what our federal system is designed to do.³⁶ Others construct their own accounts, but land in much the same place—a half-picture of the functional benefits of federalism masquerading as a comprehensive one.³⁷

³⁵ There are, of course, contributions to the literature that take heed of both sides of the federal balance. See, e.g., Friedman, *supra* note 9, at 386 (“Valuing federalism means making a serious attempt to identify and measure the values on both sides of the federalist balance.”); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 5 (2007) (acknowledging that “nationalism is also a constitutional value”); Kramer, *supra* note 9, at 1502 (“There are, after all, two sides to federalism: not just preserving state authority where appropriate, but also enabling the federal government to act where national action is desirable.”); Young, *supra* note 21, at 1736. In some ways, however, even some of these examples reflect and reinforce confusion about (and neglect for) nationalism.

In Hills’ case, the point is a semantic one. Take a look at the passage leading up to his observation that nationalism qualifies as a constitutional value:

Consider, first, the idea of a federalism-promoting canon of construction that would require a clear statutory statement before a judge could construe federal law to preempt state law. Such a canon is typically justified by the general notion that federalism is an important value in the American constitutional scheme. The difficulty with such a broad invocation of federalism, however, is that it is too general. After all, nationalism is also a constitutional value

Hills, *supra*, at 5 (footnote omitted). This passage has the virtue of properly affording nationalism the status of a constitutional value, but it misses the point that nationalism is a *part of* federalism, not distinct from it. Hills describes a state-autonomy-promoting rule as a “federalism-promoting canon,” thus disregarding the fact that a state-autonomy promoting rule might actually undermine federalism, properly understood. *Id.* Professor Friedman, meanwhile, properly acknowledges that the promotion of state power and autonomy constitutes only “half of the story about valuing federalism.” Friedman, *supra* note 9, at 405. But he then devotes nearly twenty pages of analysis to that half of the balance, while covering the nationalist half in just five. This is not a conceptual neglect for nationalism, as we see in some of the commentary I explore here, but it tends to reinforce the notion that federalism is principally concerned with the preservation of state power.

³⁶ See, e.g., David Freeman Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197, 1224 (2004); Calvin R. Massey, *Etiquette Tips: Some Implications of “Process Federalism,”* 18 HARV. J.L. & PUB. POL’Y 175, 211 (1994); David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act’s Encroachment on State Law*, 16 WASH. U. J.L. & POL’Y 129, 130–31 (2004); see also Michael S. Greve, *Federalism’s Frontier*, 7 TEX. REV. L. & POL. 93, 98 n.24 (2002) (describing the key passage from *Gregory* as an “oft-cited laundry list of federalism’s advantages”).

³⁷ See, e.g., Steven G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 27 (2001) (discussing reasons why federalism—which Calabresi labels

Some of the starkest examples of this phenomenon come from the work of Professor Young, who has written a series of articles advocating a robust presumption against federal preemption of state law.³⁸ Young insists that, under modern conditions, the presumption is essential to the preservation of state autonomy, which, in turn, is essential to securing the benefits associated with a federal system of government. Indeed, Young has gone so far as to argue that “limiting the preemptive impact of federal law on state regulation” ought to be “[t]he first priority of federalism doctrine.”³⁹ He explains “state governments . . . need to have meaningful things to do. Federalism cannot provide regulatory diversity unless states have autonomy to set divergent policies; state governments cannot provide fora for political participation and competition unless meaningful decisions are being made in those fora.”⁴⁰ The move from here to a set of claims about preemption doctrine is straightforward. Young writes:

The whole point of preemption is generally to force national uniformity on a particular issue, stifling state-by-state diversity and experimentation. And preemption removes issues within its scope from the policy agenda of state and local governments, requiring that citizen participation and deliberation with respect to those issues take place at the national level.⁴¹

“[c]onstitutionally mandated decentralization”—is a good thing, and running through a list similar to the one in *Gregory*); Merritt, *supra* note 3, at 3–10 (noting that “contemporary thinkers identify at least four positive features of our federal system,” and specifying (1) the capacity of the two levels of government to check one another, (2) the proliferation of opportunities for political participation at the state and local levels, (3) state governments’ capacities to satisfy the diverse preferences of the American people, and (4) the possibility of innovation and experimentation and innovation at the state level); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1402–03 (1997) (describing federalism as a “normative good” that stands opposed to the reduction of states’ rights, and describing the advantages of federalism in terms similar to those laid out in *Gregory*).

³⁸ See Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253 [hereinafter Young, *Preemption in the Roberts Court*]; Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (2001) [hereinafter Young, *Two Cheers*]; Young, *supra* note 19. *But see* Young, *supra* note 21 (focusing carefully on the two-sided nature of federal systems).

³⁹ Young, *supra* note 19, at 130.

⁴⁰ *Id.* at 52 (emphasis omitted). Elsewhere, Young links this observation to the interest in fostering among citizens a sense of loyalty to state government, which, he insists, “is the ultimate safeguard of state autonomy.” Young, *Two Cheers*, *supra* note 38, at 1368. Young explains:

[I]n order to attract and retain the loyalty of the People, state governments have to maintain the ability to provide beneficial regulation and services in areas that really matter. They must, in other words, have plenty to *do*. If we reach the point that most regulatory jurisdiction and government largesse flows to the national government, popular loyalty will follow. And at that point, we cannot expect the political process to protect the States.

Id. at 1369.

⁴¹ Young, *supra* note 19, at 130–31.

Thus, he concludes: “Doctrines limiting federal preemption of state law . . . go straight to the heart of the reasons why we care about federalism in the first place.”⁴²

This last claim—that the presumption against preemption “goes to the heart of the reasons why we care about federalism”—is telling. For it is no more accurate to say that doctrines *limiting* preemption go to the heart of the reasons we care about federalism than it is to say that doctrines *facilitating* preemption do the same. We care about federalism because there are benefits to empowering states *and* because there are benefits to disempowering them.⁴³ And we cared to establish a political federation “in the first place” because, among other things, excessive independence and autonomy for the states was understood by many in the Founding generation to be an impediment to the flourishing of the nascent states operating under the Articles of Confederation.⁴⁴ Thus, one cannot glibly leap from the observation that a particular practice is likely to bolster state autonomy to the conclusion that that practice is a salutary one from the perspective of our constitutional federalism.⁴⁵

Young’s tendency to conflate federalism with state autonomy is evident elsewhere in his writings on preemption. Thus, he describes the presumption against preemption and related rules of statutory interpretation as “profederalism clear statement rules,”⁴⁶ and elsewhere he characterizes them as “doctrines to protect federalism.”⁴⁷ But these characterizations are supported only by claims that the rules in question are conducive to the promotion of state autonomy, and that alone tells us nothing about whether they are, in fact, “profederalism.” Again, at least some of the time, the diminution of state power and autonomy associated with the preemption of state law is entirely healthy from a federalism perspective. Indeed, commitment to this idea is implicit in the decision to enter into a political union in the first place—or, at least, it is implicit in the decision to form a

42 *Id.* at 131; *see also* Young, *supra* note 21, at 1762 (“[F]ederalism doctrine should be designed to maximize the values that undergird our commitment to federalism in the first place, such as the values of state-by-state diversity and experimentation, political participation, and the ability of the states to protect individual liberty.”).

43 *See, e.g.*, Hills, *supra* note 35, at 5 (“The whole point of the federal scheme is to suppress states’ creativity.”).

44 *See, e.g.*, THE FEDERALIST NOS. 15, 22 *supra* note 9 (Alexander Hamilton).

45 Some of Young’s work is much more careful along this dimension. *See* Young, *supra* note 21, at 1806; Young, *Preemption in the Roberts Court*, *supra* note 38, at 319–24.

46 Young, *supra* note 19, at 116.

47 Young, *Preemption in the Roberts Court*, *supra* note 38, at 321; *see also id.* at 256 (asserting that “the courts’ role in protecting federalism should focus on facilitating and enhancing the operation of . . . political and procedural checks on national authority”).

union in which the central government enjoys meaningful powers of its own and in which national law is designated supreme over the law of member states. To conflate federalism with state autonomy is to miss this fundamental point about how our federal system works and to obscure the fact that an unduly narrow construction of national law (or of the federal government's authority under the Constitution) might upset the constitutional balance every bit as much as an overly broad one.

Professor Young is not the only commentator to neglect nationalism in this way. To the contrary, variations on this theme abound in the literature on preemption. For example, in the course of advocating diminished judicial reliance on the doctrine of obstacle preemption, Professor Nelson has argued that “our federal system is premised on the notion that members of Congress will not pursue federal policies to the total exclusion of state policies.”⁴⁸ Perhaps that is true. But it would be equally accurate to say that our federal system is premised on the notion—indeed, it is rooted in the *hope*—that members of Congress will sometimes deploy their powers *just so* they might exclude states (sometimes totally) from one policymaking sphere or another.⁴⁹

Some of what is happening here is easy enough to understand. Many of the commentators who characterize federalism in these terms surely mean to intimate that *under present conditions*—i.e. given the vastness of national power under prevailing constitutional law and the broad sweep of federal regulatory action in the modern world—our constitutional federalism calls for increased attention to its state-autonomy-preserving side.⁵⁰ These nationalism-neglecting accounts of what our federalism is designed to do, they would argue, are correctives necessitated by longstanding neglect of the *devolutionary side* of the federal scheme. From this perspective, what we are seeing here is not denial of the nationalist features of our constitutional system; it is, instead, a reflection of the fact that we have little cause to worry about the health and

⁴⁸ Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 280 (2000).

⁴⁹ Nelson's point might have greater purchase if we placed particularly heavy emphasis on his use of the word “total.” It is true enough that Congress only rarely intends to preempt an entire field. But Nelson offers this observation in the context of advocating the scaling back of “frustrates the purpose” preemption, so we can resuscitate his argument on this score only by changing it considerably.

Consider also, in this vein, Paul Wolfson's claim (advanced in a frequently cited article defending the presumption against preemption) that “[u]niformity, ‘efficiency,’ ‘predictability,’ and ‘simplicity’ are euphemisms for complete disablement of state authority.” Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 107 (1988). The basis for this claim eludes me. We might just as readily say that the interests in uniformity, efficiency, and so on are among the primary impulses motivating the establishment of our federal system. See, e.g., SHAPIRO, *supra* note 3, at 35–50.

⁵⁰ In some of his work, Young makes this point explicitly and makes a sustained effort to defend it. See generally Young, *supra* note 21.

stability of our commitment to nationalism/centralization.

But even if the instinct to write about federalism in these terms is a reaction to the steady push in the direction of centralization that we have experienced over the years, the consequence is a significant skewing of our constitutional discourse. Far too much of the commentary in this space simply fails to provide this context in the course of making the sort of stark claims about our federal system that I flagged above. Instead, as we have seen, seemingly authoritative sources, both on the courts and in the academy, now routinely treat federalism as it were synonymous with devolution or states' rights. Taken together, these phenomena suggest that even as nationalism has flourished as a matter of constitutional fact and (in some important respects) constitutional doctrine, it has been marginalized as a matter of constitutional theory.

3. *The Presumption Against Preemption and Neglect for Nationalism: Some Further Observations*

The neglect for nationalism that characterizes the law and scholarly discourse relating to the presumption against preemption has other manifestations. For example, courts routinely insist that the presumption applies with special force when Congress regulates in an area that has traditionally been dominated by the States.⁵¹ The underlying logic is clear

⁵¹ See, e.g., *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 334 (2008) (“The presumption against preemption is heightened ‘where federal law is said to bar state action in fields of traditional state regulation.’” (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995))); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (“In all pre-emption cases, and particularly in those in which Congress has ‘legislated . . . in a field which the States have traditionally occupied,’ we ‘start with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress.’” (emphasis added) (internal citation omitted) (quoting *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))). Commentators often make the same move. See, e.g., Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 741 (2008) (“It might make sense to apply a presumption against preemption in areas traditionally assigned to the states . . .”). Indeed, the Court gestured at this notion in *Rice v. Santa Fe Elevator Corporation*, which is generally treated as the birthplace of the modern presumption. 331 U.S. at 230 (beginning its analysis by noting that the statute under review entered “a field which the States have traditionally occupied”). It should be noted that there is some confusion in the case law on this score. Some passages (like the ones flagged above) suggest that there is a generally applicable presumption against preemption, and an especially potent presumption when Congress enters a field that has long been dominated by the states. Other times, it seems as if the presumption applies *only* when Congress enters a realm of traditional state control. See, e.g., *Buckman Co. v. Plaintiff's Legal Comm.*, 531 U.S. 341, 347 (2001) (“Policing fraud against federal agencies is hardly ‘a field which the States have traditionally occupied,’ such as to warrant a presumption against finding federal pre-emption of a state-law cause of action” (internal citation omitted) (quoting *Rice*, 331 U.S. at 230)).

enough. If we are generally squeamish about federal incursions on state autonomy (and the existence of a general presumption against preemption suggests that we are), then it is reasonable to be especially squeamish—and to deploy a more robust presumption—when such incursions threaten to disrupt a long-entrenched practice of leaving some regulatory field to the states.

This line of reasoning is sensible, to be sure, but we might just as easily run the analysis in the opposite direction. We might presume, in other words, that when Congress takes the extraordinary step of entering a field that had previously been left to the states, there must be an especially urgent need for federal intervention. Under these conditions, the combined force of inertia, tradition, and settled expectation is, presumably, at its apex, and so the barriers to federal action are correlatively high. When those barriers are overcome—when Congress musters the will to disturb long-established regulatory patterns—it seems downright perverse to presume that minimal disruption was intended and silly to think that such disruption might have been engineered unthinkingly. Indeed, we might want to take special care, under such circumstances, to avoid impeding Congress's efforts to address what is likely an especially tenacious social problem—one that the states had proven unable or unwilling to solve despite longstanding regulatory freedom to do so.

I do not mean to suggest by this that there ought to be a presumption *in favor* of preemption when Congress enters a field that had previously been dominated by the states. I mean only to highlight the fact that, in grappling with this particular issue, the nationalist perspective I am offering here is largely absent from the discourse.⁵²

The same could be said in connection with a well-known move in the academic literature relating to the presumption against preemption—a move that is most closely associated with the work of Professor Brad Clark. Clark has taken pains to call attention to the relationship between the Constitution's separation of powers—in particular, the cumbersome process laid out in Article I for the enactment of federal law—and the preservation of state autonomy. The separation of powers, he explains, “preserve[s] federalism both by making federal law more difficult to adopt, and by assigning lawmaking power solely to actors subject to the political safeguards of

⁵² Even Professor Dinh, who has shown a willingness to swim against the tide by insisting that “the constitutional structure of federalism does not admit to a general presumption against federal preemption of state law,” Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2087 (2000), has argued that “when Congress legislates in areas traditionally governed by the states . . . it stands to reason that Congress would proceed more cautiously and provide an interstitial rather than a comprehensive or primary set of regulations.” *Id.* at 2101.

federalism.”⁵³ The presumption against preemption, he argues, doubles down on this effort. It reins in federal judges who might be too quick to deem federal law preemptive, and it helps to ensure that preemption (and the concomitant contraction of state autonomy) is activated only by way of the burdensome procedures laid out in Article I and by officials who are (by virtue of the political safeguards⁵⁴) apt to care about the preservation of state power.⁵⁵

Here too, the conclusion seems sensible. It is reasonable to worry (or at least wonder) about the consequences for state autonomy of national lawmaking outside of the arduous process laid out in Article I. But here too, we might just as readily run the analysis the other way. We might insist that the political and procedural barriers to federal lawmaking are *so* high that we ought to guard zealously against judicial constructions that fail to give federal law its due. Indeed, it seems backwards to lay emphasis, as Clark does, on the extreme difficulty of enacting federal law, only to then insist that whatever *does* make its way through the political and procedural gauntlet ought to be treated like some regulatory virus in need of containment. We might presume, instead, that such measures as survive bicameralism and presentment (to say nothing of the myriad vetogates that are not enshrined in the Constitution⁵⁶) are likely to reflect broad and deep consensus about the need for federal action to address some pressing national problem.

More generally, while Clark is right that an array of legislation-inhibiting dynamics is woven into the fabric of our Constitution, so too, of course, are the affirmative grants of power to the national government. And I do not think the Constitution confers these powers on the national government just so we might wring hands and cower whenever they are exercised.

My point is not that federal law ought always to be read expansively, just because it is rather difficult to enact. It is simply that Professor Clark’s

⁵³ Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1324 (2001). This passage offers yet another example (surely there are hundreds, at least) of a commentator deploying the term “federalism” where “state autonomy” would be more apt. There can be no doubt that the cumbersome federal law-making process helps to preserve state autonomy. It is possible, too, that that process helps to preserve “federalism,” properly understood. But whether that is so depends on the optimal allocation of power between the federal government and the states. I think it is safe to say that Professor Clark is of the view that, at least under modern conditions, structural norms that tend to enhance the autonomy of the states are structural norms that help to preserve our federalism. But, like so many other observers, he skips the step of stating as much and explaining why that is so, and instead he treats the two things as if they were the same.

⁵⁴ For discussion of the political safeguards theory, see *infra* Part II.

⁵⁵ Clark, *supra* note 53, at 1428.

⁵⁶ See William N. Eskridge, Jr., *Vetogates*, Chevron, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1444–48 (2008).

observations about the cumbersome, politically fraught nature of the federal legislative process lend themselves to two different conclusions about how to deal with uncertainty relating to the preemptive reach of federal law. Professor Clark's conclusion has gained considerable currency in the academic commentary relating to preemption,⁵⁷ while the nationalist alternative has largely been ignored.⁵⁸

Finally, it should be noted that the core premise underlying the presumption against preemption would, if taken to its logical conclusion, support radical changes to established practice relating to the interpretation of federal law. The premise is that our Constitution favors outcomes that preserve regulatory space for the states⁵⁹—that courts ought to “err on the side of state autonomy”⁶⁰ by refusing to “give the state-displacing weight of federal law to mere congressional ambiguity.”⁶¹ But if that is right, then it would stand to reason that *any time* courts are called upon to interpret federal law—whether or not preemption is in view—they ought to resolve ambiguities in favor of the construction that gives federal law more limited reach. Otherwise, federal law might be deemed to apply in cases Congress did not intend to control, thereby narrowing states' freedom to enact and enforce a contrary rule.

In assessing, for example, whether Title VII prohibits employment practices that have a disparate impact on members of protected categories, federalism

⁵⁷ See, e.g., John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1547–48 (2008) (“Professor Clark’s Supremacy Clause thesis gives the presumption against preemption a firm (though not unassailable) constitutional grounding.”); David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1140, 1154–58 (2012); Young, *Preemption in the Roberts Court*, *supra* note 38, at 279–80.

⁵⁸ An important exception is Carlos Manuel Vázquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 NOTRE DAME L. REV. 1601, 1611 (2008) (“If the Constitution reflects a careful balance of federalism and nationalism, then, just as it would be illegitimate for courts to recognize a category of federal law created through procedures less onerous than those contemplated by the Constitution, it would also be illegitimate for the courts to impose obstacles to federal lawmaking not contemplated in the Constitution.”); see also *id.* at 1627–29 (noting that considerations of constitutional structure cannot, by themselves, resolve the question of whether a presumption against preemption is appropriate). Note that the first of these passages supplies yet another example of the scholarly tendency to treat federalism and nationalism as opposing forces. See *supra* notes 35–37.

⁵⁹ See, e.g., Young, *Two Cheers*, *supra* note 38, at 1387–88 (describing the presumption against preemption as a species of “constitutional review,” a way of “pushing interpretation of ambiguous statutes away from areas of special constitutional sensitivity”).

⁶⁰ Young, *supra* note 19, at 23 n.90.

⁶¹ *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (emphasis omitted) (internal quotation marks omitted) (quoting *TRIBE*, *supra* note 16, § 6-25).

would supply a reason to answer: “no.” And in every case calling for the interpretation of federal criminal law, the interest in state autonomy—not just the rule of lenity—would call for narrow construction of ambiguous provisions, thereby leaving the states with more latitude to determine what sorts of conduct will be criminalized within their borders. But conventions such as these are not part of our interpretive tradition, and with good reason. For “nationalism,” as Professor Hills has explained, “is also a constitutional value,”⁶² and interpretive practices that serve generally to cabin the reach of federal law inhibit our capacity to advance it. Much of the case law and literature relating to the presumption against preemption is in denial on this score.

B. Translation, Compensating Adjustment, and Neglect for Nationalism

In this Section, I turn my attention to academic commentary that calls on judges to “translate” our federalism or to make “compensating adjustments” to the federal balance in light of the erosion of state autonomy that has taken place over the course of United States history. Like the case law and commentary we encountered in Section I.A, this literature is in denial with respect to the nationalist side of our federal scheme. But unlike the denial on display earlier, the species we confront here relates to textual considerations, not functional ones. Specifically, we will examine sources that endeavor to provide general accounts of what our constitutional federalism demands, but disregard or seriously marginalize crucial nationalist features of constitutional text in the course of doing so.

Ordinarily, I would be reluctant to treat the fact that a couple of law review articles are insufficiently attentive to fragments of constitutional text as important evidence that our constitutional culture is in a general state of denial as to the import of those texts or the values underlying them. (I would be more apt to classify such a thing as the sort of run-of-the-mill argumentative shading I alluded to earlier.) In this case, however, I think the omissions are telling. One would think it impossible for informed observers—and certainly for respected authorities—to undertake to describe the essential features of our federal system without engaging seriously with the Reconstruction Amendments, as well as the Sixteenth and Seventeenth Amendments. Yet the sources canvassed here do exactly that. These omissions are too stark to allow us to chalk them up to an ordinary difference of view as to the weight to be afforded this federal-power-granting clause or that state-autonomy-preserving one. The more sensible diagnosis, I think—

⁶² Hills, *supra* note 35, at 5.

especially when we consider this commentary alongside the other sources surveyed in this Article—is that something fundamental to our constitutional discourse is askew. It is not yet our instinct to see our federalism whole.⁶³

1. “*Translating*” or “*Adjusting*” Our Federalism

The leading commentators on constitutional translation, compensating adjustment, and federalism are Professors Lawrence Lessig and Ernest Young, and it is on their work that I focus here. In his article *Translating Federalism*, Professor Lessig makes the case that fidelity to the Constitution sometimes requires judges to conjure novel doctrinal constraints in an effort to preserve features of the Framers’ plan that have come under pressure as a result of changed real-world circumstances.⁶⁴ These efforts at doctrinal development, he says, can be thought of as exercises in translation. The judge’s task is to “translate” a Founding era constitutional concept into a modern setting,⁶⁵ and the trick is to do so without crafting rules or rendering decisions that seem overly political.⁶⁶

The particulars of Lessig’s argument as applied to federalism are fairly straightforward: The scope of the federal commerce power is contingent on facts in the world; it is contingent, in particular, on the extent of national economic integration. As our economy has become more integrated, Congress’s regulatory reach has expanded,⁶⁷ and that expansion (here’s the rub) has disturbed the constitutionally ordained balance of power between the federal government and the states.⁶⁸

According to Lessig, the constitutionally required balance can be (roughly) identified by considering the Constitution’s grants of power to the national government in their historical context, the key piece of which is the relatively low level of economic integration that prevailed during the late eighteenth

⁶³ Cf. Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 980–83 (1994) (noting that Federal Courts scholars have much work to do when it comes to synthesizing the different conceptions of judicial federalism embodied in Founding era and Reconstruction era sources of law).

⁶⁴ See Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 131–35.

⁶⁵ *Id.* at 127 (emphasis omitted); see also Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

⁶⁶ Lessig, *supra* note 64, at 170–76.

⁶⁷ *Id.* at 137–40.

⁶⁸ *Id.* at 143. Lessig makes a parallel point about the relationship between economic integration and the reach of state power and explores its consequences for dormant commerce doctrine and the law of preemption. *Id.* at 154–68.

century. Under conditions of modest economic integration, the powers bestowed on the national government by the Constitution left much to the states' discretion.⁶⁹ It follows, Lessig argues, that the federal structure called into being by the Constitution contemplates a robust sphere of state autonomy. If we are to show fidelity to the Constitution, then—if we are to prevent the constitutional value of state autonomy from being “rendered helpless by changed circumstances”⁷⁰—it is necessary to translate our federalism. It is necessary, Lessig explains, “for the Court to craft . . . limits on regulative authority, both state and federal, so as to check the growth in the commerce power, to the extent that growth has set the original balance askew.”⁷¹

In a lengthy article titled *Making Federalism Doctrine*, Professor Young pursues a similar line of reasoning, but with somewhat different points of emphasis and a broader conception of the array of changes giving rise to the need for doctrinal adaptation. Thus, in addition to focusing intently on the relationship between economic integration and the expansion of the federal commerce power,⁷² Young observes that the Constitution's political and procedural safeguards of federalism have eroded over time.⁷³ These developments, Young explains, tend to facilitate the production of federal law, and that, in turn, causes the sphere of state autonomy to contract.

Young regards this as seriously worrisome from the perspective of maintaining a healthy federal balance. As noted earlier,⁷⁴ Young believes that (1) states cannot hope to deliver the benefits associated with the adoption of a federal system if they do not enjoy the loyalty of the people, and (2) states cannot earn that loyalty if they lack meaningful autonomy. Young thus concludes that our federal system is out of balance⁷⁵ and that the duty of

⁶⁹ *Id.* at 140.

⁷⁰ *Id.* at 146.

⁷¹ *Id.* at 192.

⁷² See Young, *supra* note 21, at 1764 (“The primary strategy of the original Constitution for preserving the federal balance—the doctrine of enumerated powers—has become far less effective over the last century with the advent of an integrated national economy.”). For a compelling challenge to the conventional wisdom relating to the role of enumerated powers in our constitutional architecture, see generally Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576 (2014).

⁷³ As far as political safeguards are concerned, Young emphasizes that (due to the Seventeenth Amendment) state legislatures no longer enjoy representation in the Senate, and so we can expect states' institutional interests to figure less prominently in congressional deliberation. Young, *supra* note 21, at 1764. As for procedural safeguards, Young notes that significant swaths of federal law are now generated through administrative processes not subject to the checks associated with lawmaking by Congress. *Id.* at 1792.

⁷⁴ See *supra* note 40 and accompanying text.

⁷⁵ Young, *supra* note 21, at 1806–07 (“[T]he power of the national government has grown to the point

constitutional fidelity requires judges to engineer “compensating adjustments.”⁷⁶ It requires them to craft doctrinal rules that will restore some measure of state autonomy and thereby push the system in the direction of the constitutionally required equilibrium.⁷⁷

2. *Neglect*

Many of the difficulties that inhere in the project of constitutional translation/adjustment have been canvassed by others. Most notable are the challenges of (1) figuring out which features of the constitutional landscape should be regarded as adjustable in light of changed circumstances and which should be treated as fixed points,⁷⁸ and (2) determining when real-world changes merit compensating adjustment and when, instead, constitutional interpreters ought to eschew efforts at compensation and just go with the flow.⁷⁹ My goal, however, is to explore a distinct concern relating to the accounts offered by Professors Lessig and Young—one that has received little attention in the relevant academic commentary.

Let us assume for the sake of argument that the Framers of our Constitution, if confronted with the world as it is today, would remain committed to the federalist enterprise. And let us presume, also, that some set of observers (judges, one hopes) possess the tools necessary to discern when the balance of power between the federal government and the states has deviated so far from the constitutional plan as to call for translation or adjustment. It would remain essential, even then, that efforts to nudge the system in the direction of equilibrium be calibrated by reference to the Constitution *that we have today* and not the one crafted in 1787. For the duty of constitutional fidelity extends to the Reconstruction Amendments, as well as the Sixteenth and Seventeenth Amendments (and more), with at least as

of tilting the constitutional balance at the expense of the states . . .”).

⁷⁶ *Id.* at 1775.

⁷⁷ *Id.* at 1773–75, 1783–88, 1792–98.

⁷⁸ See Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 395 (1997) (“Translators have selected an arbitrarily low level of generality at which to translate. They adjust the Framers’ constitutional commitments to reflect changed circumstances, but fail to ask whether the Framers would have remained committed to the same concepts had they been aware of future circumstances.”); see also Merrill, *supra* note 51, at 750 (taking note of “the difficulty of identifying the [proper] baseline against which one is to make a judgment about whether the division of power [between the federal government and the states] requires rebalancing”).

⁷⁹ See Klarman, *supra* note 78, at 400 (“[I]f national power expanded to meet changing reality, perhaps this is a good argument for *not* making any compensating adjustment. . . . [Such adjustments] would be, to some extent, removing with one hand what had just been granted with the other.”).

much force as it extends to the original Constitution and Bill of Rights.

Professor Lessig seems to miss this point entirely. His seminal article on federalism and translation does not address the possibility that the transformative constitutional amendments of the late nineteenth and early twentieth centuries might alter the translational calculus. Instead, Lessig emphasizes the need “to reestablish something [the] ratifiers of the Constitution chose,”⁸⁰ “to assure that the constitutional structure original[ly] established is . . . preserved,”⁸¹ and “to restore an original balance.”⁸² And although he doesn’t come out and say so directly, it seems clear that Lessig has in mind the ratifiers of the original Constitution and the structural balance embodied in the 1787 version of the document.⁸³

Professor Young does better along this dimension. Indeed, he states explicitly that “courts owe fidelity to a constitutional tradition that includes the whole sweep of our history, not just the Founding moment;”⁸⁴ and he explains that “the binding force of history extends . . . not just [to] 1787, but [to] 1800, 1868, 1876, 1937, 1964, 1980, 1994, etc.”⁸⁵ But when the time comes for Young to integrate these post-Founding developments into his account of our federalism, the analysis goes awry.

Young takes the position that the constitutional amendments of the late-nineteenth and early-twentieth centuries did not meaningfully reorient the federal system, and so the duty of fidelity attaches, still, to a conception of state-federal balance that is firmly grounded in the late-eighteenth century.⁸⁶ In particular, Young treats the Reconstruction Amendments and the

⁸⁰ Lessig, *supra* note 64, at 135.

⁸¹ *Id.* at 127.

⁸² *Id.* at 134.

⁸³ See, e.g., *id.* at 128 (“a founding balance”); *id.* at 129 (“the framing balance”); *id.* at 130 (“restoring a balance envisioned in the framing generation”); *id.* at 135 (“a balance from the founding regime”); *id.* at 136 (“recreate the initial balance of federalism”). Professor Lessig’s failure to engage with amendments enacted during Reconstruction and beyond cannot be explained away on the ground that those amendments did not directly address the particular issue on which he focused attention—*i.e.* the scope of federal power under the Commerce Clause and the outer limits of federal regulatory power as a general matter. As Lessig acknowledges (indeed, as he takes pains to emphasize), answers to those questions are properly devised by reference to big picture assumptions and understandings about the structure of our federalism, and those assumptions and understandings are informed by (among other things) all of what the Constitution has to tell us about federal power and the limits on state autonomy.

⁸⁴ Young, *supra* note 21, at 1756; see also *id.* at 1773 (advocating an approach to constitutionalism “that takes account of the entire arc of our history”); *id.* at 1796–97 (similar).

⁸⁵ *Id.* at 1774.

⁸⁶ *Id.* at 1812 (“[N]othing in our history since the Founding absolves courts of their obligation of fidelity to the basic notion of a federal balance.”).

Seventeenth Amendment (the Sixteenth is not discussed at all) as targeted, narrow points of departure from the federalism of the Founding era—departures that did not disrupt the basic contours of the system or dislodge the original Constitution’s “strong commitment to a balanced federal structure.”⁸⁷ He insists that the Reconstruction Amendments did nothing more than “confer national power to deal with the issues of racial oppression that led to the War,”⁸⁸ and thus left “the basic allocation of authority between [the] states and nation intact.”⁸⁹ While he acknowledges that the Seventeenth Amendment’s abandonment of the practice of having state legislatures choose United States senators in favor of a scheme of direct popular election could not help but diminish congressional solicitude for states’ institutional interests, he deems this a “collateral” effect of the Amendment, and argues that that effect ought to be cabined in the name of Burkean incrementalism.⁹⁰

Young’s assessment of the consequences for federalism doctrine of the Reconstruction Amendments, as well as the Seventeenth Amendment, is methodologically dubious. He acknowledges that when it comes to structural principles such as federalism, the constitutional whole is generally treated as greater than the sum of its individual textual parts.⁹¹ Standard practice, in other words, is to consider relevant fragments of text together, and to construct a general account of our constitutional federalism from there. The divide-and-conquer strategy Young deploys when he attempts to integrate (or, more accurately, determines *not* to integrate) the post-Civil War amendments into his account of federalism is at odds with this conventional practice.

More importantly, his reasoning is unpersuasive. Our Constitution now binds states to national norms of equality and procedural fairness, and it empowers Congress to enact laws enforcing those norms.⁹² It establishes an array of national rules governing access to the franchise.⁹³ It confers upon the federal government vastly greater financial resources and leverage by authorizing direct taxation of income.⁹⁴ And it severs the direct electoral link

⁸⁷ *Id.* at 1766; *see also id.* at 1775 (discussing “a judicial obligation to enforce the Founders’ commitment to some sort of balance between national and state authority”).

⁸⁸ *Id.* at 1813.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1813–14.

⁹¹ *Id.* at 1747 (refusing to endorse the notion that the “authority of structural principles” is limited to “their specific instantiations in the text”).

⁹² U.S. CONST. amend. XIV.

⁹³ U.S. CONST. amends. XV, XIX, XXIV, XXVI.

⁹⁴ U.S. CONST. amend. XVI. For a discussion on the role of the Sixteenth Amendment in

between the United States Senate and the state legislatures in favor of one between the Senate and the people.⁹⁵ None of this was true in 1787. This is not to say, necessarily, that state autonomy no longer qualifies as an important constitutional value; but if it does, it is a very different value from the one that prevailed at the Founding.

It bears emphasis, moreover, that these changes to our federal system are not an outgrowth of judge-made legal doctrine, nor are they byproducts of the sweeping social and economic changes on which the translation theorists focus so much attention. These changes are written into the text of our Constitution, and they reflect intentional decisions by the People to empower the nation and/or the national government at the expense of the states. Even considered in isolation, not one of these changes could sensibly be classified as only a minor deviation from the federalism of the Founding era. And when we consider them in the aggregate, it becomes apparent that our federal system has undergone sweeping revision. Professors Lessig and Young, it would seem, are calling for fidelity to a Constitution that we no longer have.

The analyses offered by these translation theorists are examples of, and are enabled by, the neglect for nationalism that pervades our constitutional discourse. It is too facile to say that a world in which supremacy is classified as “extraordinary,” and in which “federalism” and “devolution” are routinely conflated, is predictably one in which the federalism-restructuring amendments of the late-nineteenth and early-twentieth centuries will be overlooked or radically minimized. But the phenomena are mutually reinforcing, and they conspire to produce a badly skewed picture of our federal scheme.

II. COMPLACENCY

In this Part, I turn my attention to a different breed of neglect for nationalism—one I label “complacency.” The complacency I document here comes in two (related) forms. First, there is the tendency to treat the preservation of state power as the central challenge for the modern law and theory of federalism. It is the tendency to presume that, with the changes to our constitutional law and culture that took place over the course of the

underwriting the expansion of federal power, see Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights*, 99 YALE L.J. 1711, 1736–37 (1990) (reviewing ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* (1989) and noting that “[t]he Sixteenth Amendment made available to the Federal Government a vast resource of revenue previously denied to it”).

⁹⁵ U.S. CONST. amend. XVII.

twentieth century, we have achieved something like peak-nationalism, and all that remains for the constitutional law of federalism to do is tend to the vulnerable states. Second, there is the instinct to explore and to celebrate new and underappreciated vehicles for the empowerment of states, without assessing the costs of such empowerment for national power, national policy, and national institutions. These instincts betray a lack of concern for the stability of our nationalism and a lack of imagination as to the possibility of its further development.

A. The Political Safeguards Theory: Setting the Terms of Debate

When Herbert Wechsler published his famous essay *The Political Safeguards of Federalism*⁹⁶ in 1954, it was in the midst of considerable intellectual ferment pertaining to the expansion of federal power that had taken place over the prior two decades.⁹⁷ Just four years earlier, Edward Corwin had taken to the pages of the *Virginia Law Review* to mark “[t]he [p]assing of [d]ual [f]ederalism” and to argue that our federal system “has been overwhelmed and submerged . . . so that today the question faces us whether the constituent States of the System can be saved for any useful purpose.”⁹⁸ Corwin was not alone in this assessment.⁹⁹

Wechsler, however, did not share these concerns. Indeed, the central message of his brief essay might best be summed up as: “Relax. The states are—and will continue to be—just fine.” Wechsler’s confidence that the devolutionary side of our federalism could and would continue to thrive, even as the national government extended its regulatory reach (and the Supreme Court got out of its way), was rooted in a series of observations about the constitutionally ordained mechanics of our political system. These

⁹⁶ Herbert Wechsler, *The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

⁹⁷ See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 216 (2000) (“The full implications of the battle waged in the 1930s over the role of the national government had not been immediately apparent. . . . It was only after the war, in the late 1940s, that commentators were able to begin soberly to examine the transformation that had taken place. While most of the commentary [at the conference during which Wechsler presented *Political Safeguards*] applauded the Supreme Court’s renunciation of its role as Protector of the States and Keeper of the Spirit of ‘98, justifications seemed surprisingly hard to find. A few commentators mentioned Congress’s superior ability to deal with the complexities of modern society, but others embraced the new regime more hesitantly, plainly uneasy with the Supreme Court’s withdrawal from the field of battle.” (footnotes omitted)).

⁹⁸ Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 23 (1950).

⁹⁹ See, e.g., Frank R. Strong, *The Future of Federalism in the United States*, 22 TEX. L. REV. 255, 255 (1944).

observations are among the most widely known and carefully scrutinized claims to be advanced by a scholar of federalism over the last century, so I will not rehearse them in detail here. Suffice it to say that, in Wechsler's view, states' role in the composition of the federal government—in particular, their role in the selection of the President, senators, and members of the House—makes it exceedingly unlikely that the national government will seriously impair states' autonomy.¹⁰⁰ Our politics, he argued, is rigged to assure that federal officials will take account of state interests when exercising their authority, and so the system is “intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states.”¹⁰¹ Wechsler pivoted from this point to the more provocative claim that the task of protecting states from federal intervention is primarily one for Congress, not the federal courts.¹⁰²

Wechsler's argument would come in for heavy criticism over the years, some of it justified. Most notably, even if we credit the claim that structural features of our political system will cause national politicians to be sensitive to state *interests*, it does not follow that the system is well adapted to assure the preservation of state *autonomy*.¹⁰³ And it is the latter, not the former, that typically occupies the attention of those concerned about the diminished standing of states within our federal system.

My goal, however, is not to assess the merits of Wechsler's arguments. It is to call attention to the questions at the foreground of his analysis and to flag some important questions he chose not to engage. The political safeguards theory is an answer to the question of whether one could reasonably expect our constitutional system to attend to the interests and autonomy of the states even under conditions of expansive federal authority. It is, more specifically, an effort to highlight (what were at that point) underappreciated reasons to answer that question in the affirmative.

¹⁰⁰ See Wechsler, *supra* note 96, at 546–48. These are not the only features of our constitutional order that, in Wechsler's view, are conducive to the promotion of state interests. See *id.* at 544–46 (discussing the simple fact of “the continuous existence of the states” and the persistence of a legal-political tradition that treats federal regulation as exceptional and in need of special justification).

¹⁰¹ *Id.* at 558.

¹⁰² *Id.* at 559 (“Federal intervention as against the states is thus primarily a matter for congressional determination in our system as it stands.”).

¹⁰³ See, e.g., Kramer, *supra* note 9, at 1510–11; Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1477 (2001) (“[T]he disciples of the political safeguards theory . . . mistake the advancement of state interests for the protection of state sovereignty.”).

At some level, this hardly seems worthy of note. It is predictable that students of federalism during the post-New Deal era, confronted with the Supreme Court's capitulation to the significant expansion of federal regulatory power, would worry that state autonomy had gone the way of the dodo. Still, it matters that Wechsler (and his scholarly descendants¹⁰⁴) focus so intently on state autonomy, for the decision to do so is, from a nationalist perspective, a decision to play defense.¹⁰⁵ Here's what I mean: As noted earlier, the dramatic changes to our federal system that took hold during the first half of the twentieth century were motivated (in part) by real world changes in the integration of our nation's economy and in the complexity of the regulatory challenges confronting the country.¹⁰⁶ As these challenges came into focus, we might have expected observers to worry that our commitment to preserving state power and autonomy would impede efforts to address them. We might have expected them to worry, moreover, along two distinct dimensions. First, there is the matter of federal authority—the question of whether the prevailing conception of the national-power-granting clauses of the Constitution was sufficiently capacious to underwrite necessary regulatory interventions by the federal government. That question was heavily mooted during the first half of the twentieth century and resolved on decidedly nationalist terms, largely through the landmark decisions in *NLRB v. Jones & Laughlin Steel Corp.*,¹⁰⁷ *United States v. Darby*,¹⁰⁸ and *Wickard v. Filburn*.¹⁰⁹

But there is also the question of whether invigorated and active national governance might require reimagining the constitutional duties that run from the states to the nation. Thus, as our collective sense of what counts as a legitimate federal regulatory interest expanded, and as the doctrinal tools necessary for the federal government to advance those interests were activated, we might have expected scholars to attend, also, to the question of how federal laws, policies, and interests might be insulated from the disruptive behavior of dissenting states. After all, it is not much use

¹⁰⁴ See, e.g., JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 171–90 (1980); Kramer, *supra* note 97, at 215–16.

¹⁰⁵ Wechsler's essay, it must be emphasized, is not an expression of anxiety about the expansion of national power; it is an effort to alleviate such anxiety. So, while it is right to say that the safeguards theory is fixated on state autonomy, this fixation registers differently from the handwringing about state autonomy one tends to see from skeptics of national power.

¹⁰⁶ See *supra* notes 67–68 and accompanying text.

¹⁰⁷ 301 U.S. 1 (1937).

¹⁰⁸ 312 U.S. 100 (1941).

¹⁰⁹ 317 U.S. 111 (1942).

ratcheting up federal regulatory capacity if that capacity is readily subject to sabotage. Scholars might also have turned to the question of whether and how states could be called upon to help implement and enforce federal law and policy, since recognition of ever-more-expansive federal regulatory power might also call for the deployment of new or infrequently used tools—of which the states might be one—to buttress and effectuate that power.¹¹⁰

Wechsler's essay, however, does not engage these concerns and focuses, instead, on the question of whether our federal system could be expected to remain sensitive to state interests. There is some temptation to insist that there was not really much cause to worry (at least at the level of legal doctrine) about states' obligations vis-à-vis federal law and about the prospect of giving back the nationalist gains associated with New Deal constitutionalism. After all, the Supremacy Clause is the constitutional device we use to mediate conflict between state and federal law, and it comes down emphatically on the side of the nation. With the principle of federal supremacy in place, one might argue, it was not necessary to tweak the constitutional or subconstitutional law of state duties in order to position the states properly alongside the newly empowered national government. From this perspective, scholarly neglect of this set of questions seems like a non-event.

But this reasoning is shortsighted. For it is by no means obvious that, in order to deal effectively with the social and economic challenges presented by modernity, federal supremacy and other nationalist values need only remain static and functional, just so long as the domain over which they operate is permitted to grow. It seems plausible, instead, that these challenges would call for modifications to the core content of our nationalist, state-restraining values as well, or, at the very least, that these challenges would spawn questions about state obligations with respect to federal law and policy that might previously have been hidden from view or thought unimportant.¹¹¹

¹¹⁰ The Supreme Court confronted such a question not long before Wechsler penned his famous essay, so it cannot be said that these issues were too hazy to identify or would come into focus only in the distant future. Thus, in *Testa v. Katt*, the Court reversed a Rhode Island court's determination that it need not exercise jurisdiction over a claim arising under the Federal Emergency Price Control Act. 330 U.S. 386, 388–89 (1947). The state court had held that it could not hear the claim because it lacked jurisdiction to enforce the penal laws of a foreign sovereign. *Id.* at 388. The Supreme Court, however, insisted that state courts of competent jurisdiction have a duty to participate in the enforcement of federal law. *Id.* at 394.

¹¹¹ Questions fitting this description would emerge as major battlegrounds in the law of federalism over the latter part of the twentieth century. See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996) (holding that Congress cannot abrogate state sovereign immunity when legislating pursuant

From this perspective, it is easier to perceive the choice—and the hint of complacency—that inheres in Wechsler’s response to the mid-century upheaval in the constitutional law of federalism. His article endeavors to provide reassurance that the states would be just fine. It does not engage the possibility that the nation might not be—that the nationalist advance embodied in the constitutional law of the era might be in need of scaffolding. In this way—and especially in light of the fantastic prominence the safeguards theory would come to enjoy—Wechsler helped the national power skeptics to set the agenda for a generation of federalism scholars. That agenda treated the potential collapse of state autonomy, rather than the fragility or future of our budding nationalism, as the central object of concern for federalism scholars.

I do not mean this as a criticism of Wechsler, certainly not a sharp one. He is entitled to his choice of subject, and it seems safe to say that any scholar who publishes an article that sets the terms of debate within his field for half a century has chosen his subject well. But the terrain over which debate relating to the constitutional law of federalism takes place is now so numbingly familiar—both in its fixation on the preservation of state autonomy and on the matter of courts’ role in the preservation effort—as to obscure the fact that Wechsler (and the generation of commentators that followed him) could have chosen a different path—one that focused on the consolidation, or even expansion, of the nationalist constitutional project.

B. The Complacency of New Nationalism

Further (and more recent) examples of complacency can be found in academic literature that travels under the heading “new nationalism.” This body of commentary is centered around the provocative claim that (1) empowerment of states can help advance a range of goals that are congenial to proponents of a strong central government,¹¹² and so (2) self-

to its powers under Article I of the Constitution); *New York v. United States*, 505 U.S. 144, 188 (1992) (“The Federal Government may not compel the States to enact or administer a federal regulatory program.”); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985) (holding that the Tenth Amendment poses no obstacle to the application of the Fair Labor Standards Act to state employees).

¹¹² See, e.g., Gerken, *The New Nationalism*, *supra* note 10, at 1893 (“[F]ederalism can be a tool for improving national politics, strengthening a national polity, bettering national policymaking, entrenching national norms, consolidating national policies, and increasing national power.”). One can see from this passage that, like so many others, the new nationalists often use the term “federalism” when they mean something closer to “devolution.” The claim that federalism, properly understood, can achieve the things Gerken specifies here is consistent with the argument

identified nationalists ought to scale back their general distrust of state government and let go of their sometimes-reflexive aversion to state empowerment.¹¹³ As Dean Gerken (the leading figure of the new nationalist school) put it: “[A] committed nationalist ought to believe in federalism.”¹¹⁴

In defending and developing these claims, the new nationalists focus a great deal of attention on the opportunities for state empowerment that are presented by cooperative federalism schemes. The new nationalists emphasize, in particular, that although states’ policymaking discretion is typically limited in important ways when they participate in the implementation of federal programs, it is also the case that states are able to wield significant power while working within these cooperative frameworks.¹¹⁵ This matters because it suggests that constitutionally protected autonomy from the impositions of the federal government is not a strict prerequisite to the exercise of real power by the states.¹¹⁶ And that, in turn, means we might secure some of the benefits associated with the devolutionary side of our federalism without taking on the risks (to national values, institutions, and policies) that might follow from empowering states through the device of constitutionally protected autonomy.¹¹⁷

Crucially, for our purposes, new nationalist enthusiasm for the exercise of state power in the context of cooperative federalism schemes is not limited to

she develops in her article, but it is clear from context and from Gerken’s other work that the point she wishes to drive home is that state empowerment (which is of course only half of what federalism is about) can advance the nationalist goals she identifies. The terminological error is endemic to the new nationalist literature. *See, e.g.*, Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958, 1967 (2014) (“Federalism, of course, is the main competitor to nationalism . . .”); *see also* Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1923 (2014) (“Understanding ‘federalism as the new nationalism’ thus complicates both the ‘federalism’ and the ‘nationalism’ sides of the equation.” (footnote omitted) (citing Gerken, *New Nationalism*, *supra* note 10)).

¹¹³ *See, e.g.*, Gerken, *The New Nationalism*, *supra* note 10, at 1890 (“It’s time for the nationalists, who have often rebuked federalism’s proponents for being behind the times, to catch up to today’s realities.”); Gerken, *supra* note 112, at 1963 (“Nationalists have a bad habit of conflating ‘Our Federalism’ with your father’s federalism. . . . But federalism today is largely sheared of its traditional trappings.”).

¹¹⁴ Gerken, *The New Nationalism*, *supra* note 10, at 1890; *see also id.* at 1891 (“[F]ederalism’s ends . . . are also nationalist ends.” (emphasis omitted)).

¹¹⁵ *See, e.g.*, Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1268 (2009) (observing that states often find “microspheres of autonomy” within cooperative federalism programs).

¹¹⁶ *See, e.g., id.* at 1263 (“Scholars who endorse the normative position that states should serve as rivals and challengers to the federal government largely miss the descriptive possibility that states can do so even where they lack autonomy.”).

¹¹⁷ *Id.* at 1261–64; *see also* Bulman-Pozen, *supra* note 112, at 1956 (“Lacking an autonomous realm of action in critical areas, states nonetheless imbue federal law with diversity and competition . . .”).

instances in which state officials work dutifully within the limits set by federal law to advance congressional policy. It extends, too, to circumstances in which states take advantage of their roles as implementers and enforcers of federal law to challenge, remodel, or even thwart national policy. Indeed, such exercises in dissent lie at the core of new nationalist thinking about state empowerment. This comes through most clearly in the work of Professor Bulman-Pozen and Dean Gerken. In their co-authored article, *Uncooperative Federalism*, for example, Bulman-Pozen and Gerken catalog the myriad ways in which states are able to “resist federal mandates,”¹¹⁸ “challenge federal authority”¹¹⁹ and “contest federal policy”¹²⁰ when operating under the auspices of (supposedly) cooperative governance schemes.¹²¹ States might do these things, the authors explain, by exercising statutorily-granted discretion in a manner that deviates from national policy, by engaging in regulatory gap-filling in ways that force federal regulators to reconfigure national policy, or simply by declining to enforce fragments of federal law with which they disagree.¹²²

Bulman-Pozen and Gerken argue that this uncooperative behavior offers a “distinct set of normative benefits”¹²³ that “have not been fully appreciated”¹²⁴ by commentators. They argue, in particular, that it creates opportunities for states to advance their own regulatory agendas, and even enables state officials more effectively to wrest control of the national policymaking agenda from federal officials.¹²⁵ They take pains to build “the

¹¹⁸ Bulman-Pozen & Gerken, *supra* note 115, at 1263.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1288.

¹²¹ *See id.* at 1259 (noting that states are able to “tweak, challenge, and even dissent from federal law” when exercising power within cooperative federalism schemes); *see also* Bulman-Pozen, *supra* note 112, at 1934 (noting that when states participate in the administration of federal law, they are able to “inject diversity, contestation, and a degree of chaos . . . into national governance”); Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349, 1373 (2013) [hereinafter Gerken, *Exit, Voice, and Disloyalty*] (noting that the strongest forms of state contestation “involve genuine rebellion—a deliberate effort to thwart federal law, or at least implement it in a manner plainly inconsistent with the federal mandate”); Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 65 (2010) [hereinafter Gerken, *All the Way Down*] (taking note of states’ capacity to “challenge, thwart, even defy the decisions of the national majority” through their participation in federal-state governance schemes); Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1558 (2012) [hereinafter Gerken, *Our Federalism(s)*] (discussing efforts by two states “to hijack federal welfare policy, [by] creating model regimes that helped pull down federal policy from within”).

¹²² Bulman-Pozen & Gerken, *supra* note 115, at 1271–80.

¹²³ *Id.* at 1285.

¹²⁴ *Id.* at 1260.

¹²⁵ *Id.* at 1286–87, 1292–93; *see also id.* at 1284–94 (exploring an array of potential benefits associated with uncooperative state behavior).

normative case for valuing such resistance,”¹²⁶ and they emphasize the advantages uncooperative federalism offers relative to other vehicles for state resistance to federal power and policy.¹²⁷

It is hard to argue with the descriptive claims on offer here. In particular, there can be no doubt that states are sometimes able to rely on their power and discretion in connection with cooperative federalism programs to contest and undermine federal policy. It seems likely, moreover, that these exercises in dissent and pushback sometimes enable states to exercise greater control over local, and even national, policy. But the difficult and important question, I think, is not whether states’ role in the administration of federal law affords them opportunities to mangle national policy and reshape it to their liking. (Of course it does.) The question is whether these exercises in dissent are, from the perspective of sound federalism and good governance, cause for celebration or lament. It is whether the benefits of empowering states in the ways identified by the new nationalists outweigh the costs.

When states “resist federal mandates” or “challenge federal authority,” their actions raise a host of difficult questions sounding in national supremacy and relating, more generally, to the mechanics of our federal system: At what point does uncooperative state behavior run afoul of Article VI? Is it consistent with the nationalist features of our Constitution for states to attempt to “thwart [or] defy the decisions of the national majority?”¹²⁸ When is the introduction of “diversity, contestation, and . . . chaos”¹²⁹ to the process of national governance a welcome development, and when is it a worrisome exercise in subverting the outcome of a hard-fought political battle? The new nationalists do not say.

Bulman-Pozen and Gerken acknowledge that state pushback against federal law and policy may not always be desirable.¹³⁰ And on multiple occasions—in *Uncooperative Federalism* and other work—they gesture at some of the difficult questions teed up by their analyses. But in every instance, they choose to explore “the possibilities”¹³¹ and “underappreciated benefits”¹³² associated with state dissent from federal law and policy and to leave those

¹²⁶ *Id.* at 1264.

¹²⁷ *Id.* at 1260, 1292; see also Gerken, *Exit, Voice, and Disloyalty*, *supra* note 121, at 1350 (taking note of “the productive possibilities associated with the principal-agent problem” (emphasis omitted)).

¹²⁸ Gerken, *All the Way Down*, *supra* note 121, at 65.

¹²⁹ Bulman-Pozen, *supra* note 112, at 1934.

¹³⁰ See, e.g., Bulman-Pozen & Gerken, *supra* note 115, at 1260.

¹³¹ *Id.* at 1258.

¹³² *Id.* at 1285.

difficult questions for another day.¹³³

It can be immensely valuable, of course, to call attention to possibilities that have been overlooked by informed observers—to explore benefits not yet considered and to demonstrate that they are real. But at some point it becomes necessary actually to evaluate those possibilities—to assess the asserted benefits alongside their potential costs. You cannot build a compelling case while ignoring half the problem.

What, then, explains the new nationalists' persistent neglect of the questions flagged above? Why take such pains to build this “normative case” while holding what appears to be the essential normative question in abeyance? The answer, I think, is complacency. It is that the new nationalists believe the problem they shunt aside so consistently is not *really* a problem—certainly not a serious one.¹³⁴ There are numerous signals to this

¹³³ See, e.g., Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1081 n.7 (2014) [hereinafter Bulman-Pozen, *Partisan Federalism*] (“Consideration of the many tradeoffs that inform a complete normative assessment must await future work.”); Bulman-Pozen & Gerken, *supra* note 115, at 1284–85 (“[T]here is a good deal more empirical and analytic work to be done before a proper assessment of uncooperative federalism can be made We leave a full development of these questions for future work.”); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1751 (2005) (“The purpose of the Article is simply to identify the benefits decisional dissent offers and to provide a framework for identifying the tradeoffs and risks inherent in the choice to pursue those benefits. . . . [I]t does not offer the sort of contextual details that would be necessary to decide precisely when dissenting by deciding is a preferable strategy for institutionalizing dissent.”); *id.* at 1753 (“While I address some of these issues in this Article and elsewhere, I leave a full account of these complexities for another day.” (footnotes omitted)); *id.* at 1798 (“Although the type of detailed, contextual analysis necessary to make such a judgment is beyond the scope of this Article, this Part offers some preliminary thoughts on the questions we would want to answer in making such choices.”); Gerken, *Exit, Voice, and Disloyalty*, *supra* note 121, at 1377 (“My goal is to illuminate a set of arguments that are too often excluded from the cost-benefit calculus, not do the math for you in advance. . . . I thus won’t canvass the litany of grievances we conventionally associate with the principal-agent problem.”); Gerken, *All the Way Down*, *supra* note 121, at 71 (“While this Foreword begins to identify a set of costs and benefits that have been overlooked in the debate thus far, it does not provide a new scale for balancing them”); Gerken, *supra* note 112, at 1960–61 (“Proof of [this Article’s central claim] cannot be fully canvassed in a short essay An essay, at best, can raise questions.”); *cf.* Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 464 (2012) [hereinafter Bulman-Pozen, *Federalism as a Safeguard*] (discussing federalism’s capacity to safeguard separation of powers values and “reserv[ing] a more complete, normative assessment for future work”); *id.* at 463 (acknowledging that there are potential “costs [to] state resistance” but declining to explore them).

¹³⁴ In making this claim, I am doing something Dean Gerken specifically implored her readers *not* to do. She wrote:

The risk in offering an affirmative account . . . is that the reader may eventually slip into thinking that the author “really” thinks her new factors trump the well-known costs and benefits we typically consider when deciding whether to devolve power. Please don’t. . . . The point is not to do the math in advance, but simply to illuminate a set of arguments that are too often excluded from the equation.

effect in the new nationalist literature. In particular, there are hints that the new nationalists believe state empowerment no longer poses a serious threat to national policy or institutions. I explore and scrutinize these claims below.

1. *Reimagining the “National”*

One of the recurring themes in the new nationalist literature (especially Professor Bulman-Pozen’s work) is the supposed collapse of the distinction between that which is “state” and that which is “national.” This collapse is attributed to two forces in particular. First, as cooperative governance schemes are now a staple feature of the American regulatory landscape, the contours of nominally federal regulatory programs are often established through processes of lobbying, drafting, implementation, and oversight in which states participate as both collaborators and independent actors.¹³⁵ This means we no longer live in a world characterized by the rigid separation of state- and nation-based regulatory domains. Instead “state and federal governments,” Professor Bulman-Pozen explains, “together produce *national* governance.”¹³⁶

Second, it is increasingly the case that when states push back against the exercise of national power, they are not motivated by interests that are distinctive to any particular state or group of states, nor are they driven by a general, theoretical, or institutionally-motivated commitment to the preservation or expansion of state autonomy.¹³⁷ Instead, when states compete with the national government, or challenge the exercise of national power, it is often the case that their goal is simply to advance the agenda and

Gerken, *All the Way Down*, *supra* note 121, at 11. At this point, however—which is to say, with more than a decade gone by, and with the publication of more than half a dozen articles and essays celebrating state-based dissent from national policy and touting devolution as a species of nationalism—I think it fair for readers to assign exactly that view to the new nationalist school, Gerken in particular. One cannot reasonably expect to play the role of provocateur—telling nationalists they need to “put up or shut up,” Gerken, *supra* note 112, at 1962, and that they are out of touch with reality, Gerken, *The New Nationalism*, *supra* note 10, at 1890—without owning the substantive claims at the heart of the provocation.

¹³⁵ Bulman-Pozen, *supra* note 112, at 1932.

¹³⁶ *Id.* at 1922 (emphasis added); *see also* Bulman-Pozen, *Partisan Federalism*, *supra* note 133, at 1101 (explaining that modern governance yields many policies that “are only ‘state’ or ‘national’ in the sense of their site of enactment, not their purposes or intended audience”).

¹³⁷ Bulman-Pozen, *Partisan Federalism*, *supra* note 133, at 1090 (“Party politics means that state opposition need not be based on something essentially ‘state’ rather than ‘national.’”); *id.* at 1100 (“Depending on the particular question and the broader context, some states champion state autonomy while others welcome national action. State status as such does not tell us when states will make arguments sounding in sovereignty and oppose the federal government.”).

interests of the political party that is out of power at the national level.¹³⁸ These interests are held by individuals and groups spread across the country and are championed by organizations and donor networks that operate on a national scale.¹³⁹ Accordingly, Bulman-Pozen concludes, states are properly understood as a kind of *national* actor—they “participate in controversies that are national in scope and do so on behalf of the nation’s people at large.”¹⁴⁰

So far as the new nationalists are concerned, these dynamics require us to reorient our thinking about the state/federal distinction. Thus, Bulman-Pozen has argued that “state and national interests are one and the same,”¹⁴¹ that “‘the national’ is not defined by Washington alone,”¹⁴² and that “it no longer makes sense to focus on distinctive state and national interests.”¹⁴³ Gerken, meanwhile, has argued that “[s]tates now serve demonstrably national ends,”¹⁴⁴ that state empowerment “is a means to achieving a well-functioning *national* democracy,”¹⁴⁵ and that “[t]here is little point to valorizing categories like ‘state’ and ‘national.’”¹⁴⁶ As the *cri du coeur* of this developing school of thought proclaims, federalism should not be regarded as antagonistic to nationalism; rather it *is* nationalism, adapted to modern conditions.

Some caution is in order before evaluating these claims. I do not think Professor Bulman-Pozen means to suggest that state and national interests are always perfectly coextensive. And I do not take Dean Gerken’s delphic

¹³⁸ *Id.* at 1090 (“[A]s Democratic and Republican politicians compete to gain power and implement partisan agendas, federalism provides critical infrastructure for their conflict. . . . States governed by the party out of power in Washington seek both to obstruct federal policy and also to challenge it through affirmative acts.”).

¹³⁹ See Bulman-Pozen, *supra* note 112, at 1932–33 (“[S]tates facilitate competition between the Democratic and Republican parties and offer staging grounds for national networks seeking to further their agendas. . . . Instead of advancing particularistic commitments, states often give concrete form to interests that exist throughout the nation . . .”).

¹⁴⁰ Bulman-Pozen, *Partisan Federalism*, *supra* note 133, at 1082; see also Bulman-Pozen, *supra* note 112, at 1947 (explaining that state challenges to federal authority “advance one set of *national* interests against another set of *national* interests, not state interests against national interests” (emphasis added)).

¹⁴¹ Bulman-Pozen, *supra* note 112, at 1949.

¹⁴² Bulman-Pozen, *Partisan Federalism*, *supra* note 133, at 1091; see also Bulman-Pozen, *supra* note 112, at 1933 (arguing that when states intervene in political disputes they “enable a variety of national publics to emerge”).

¹⁴³ Bulman-Pozen, *supra* note 112, at 1947; see also *id.* at 1922 (“Taking administration and partisanship seriously means we must acknowledge a certain incoherence to invoking state governance and interests in opposition to federal governance and interests.”); Bulman-Pozen, *Partisan Federalism*, *supra* note 133, at 1090 (suggesting that states no longer represent “distinctively state interests against the distinctively national interests of the federal government”).

¹⁴⁴ Gerken, *The New Nationalism*, *supra* note 10, at 1917.

¹⁴⁵ *Id.* at 1893.

¹⁴⁶ *Id.*

admonition that we refrain from “valorizing” the categories “state” and “national” to mean that those terms are, in her view, utterly useless to students of American federalism. Instead, Gerken and Bulman-Pozen mean to caution self-identified nationalists to discard the reflexive assumption that state empowerment is inimical to nationalism and national interests. With state and federal governance, as well as state and federal interests, now so messily intertwined, the argument goes, it will often be the case that state-based pushback against federal law and policy can itself be classified as “nationalist.”¹⁴⁷ And why should the nationalist fear what is nationalist?

The new nationalists go awry here by eliding the distinction between what is “national” and what is “nationalist.” It is sensible to characterize the coordinated effort of a nationwide political party to advance a goal that is shared by people scattered across the country as “national.” But we would need to know more before we could venture a guess as to whether that effort could properly be labeled “nationalist” as well.

For Bulman-Pozen, the appropriateness of the classification seems to turn on the motivation for state behavior. So long as pushback against national power or policy is not driven by a general, trans-substantive commitment to devolution—so long as state officials do not “really” care about state power and are only using state empowerment as a convenient tool to advance the agenda of a nationwide political party—the term “nationalist” fits just fine. But I am not sure why that should be. If you are a self-styled nationalist—which is to say, if you are generally concerned about the consequences of state empowerment, about impediments to the faithful implementation of federal law and policy, and about the health and stability of national institutions—what difference should it make *why* some state or state official endeavors to undermine federal policy or power? An argument in favor of state autonomy does not become nationalist just because it is pretextual (nor because it has implications for political debates that are national in scope).

Curiously, this error—the conflation of “national” with “nationalist”—is the mirror image of a well-known and significant flaw that numerous commentators (Bulman-Pozen included) have identified with the famous political safeguards theory. That theory, you will recall,¹⁴⁸ posits that because elected national officials are beholden to state-based electorates, they are

¹⁴⁷ Bulman-Pozen, *Partisan Federalism*, *supra* note 133, at 1091 (explaining that party politics adds a “nationalist dimension” to our federal system); *see also* Bulman-Pozen, *supra* note 112, at 1949–50 (“States’ critical role in staging partisan conflict concretizes the diversity of interests that may be properly understood as ‘national.’”).

¹⁴⁸ *See supra* text accompanying notes 100–02.

unlikely to exercise power in ways that do violence to important state interests. As Professor Bulman-Pozen has noted, however, “the[] structural safeguards [identified by Wechsler] at best protected geographically concentrated interests, not the autonomy of state institutions.”¹⁴⁹ Wechsler, in other words, identified reasons to believe that elected federal officials would care to advance the interests of *people* living in their home states. But that is different from advancing or preserving the power of the states themselves, and federalism, of course (its devolutionary side, at least), is concerned with the latter. The “nationalism” on display in Bulman-Pozen’s work just runs this error in the opposite direction: It proceeds from the premise that the promotion of geographically dispersed interests qualifies as a species of nationalism, even if the effort diminishes the power of national institutions or impedes the implementation of national policy. This is wrong.

To be clear, I do not doubt the new nationalists’ claim that devolution (which they often confusingly label “federalism”) *can* serve nationalist ends.¹⁵⁰ But it is a leap from that observation to the more sweeping assertions that lie at the heart of the new nationalist school of thought: that “a committed nationalist ought to believe in federalism,”¹⁵¹ that “federalism’s afterlife [is] a form of nationalism,”¹⁵² or, indeed, that federalism (not just its “afterlife”) *is* our modern-day nationalism. These claims make little sense if one is committed only to the modest proposition that greater measures of devolution and state-based pushback against the federal government might occasionally yield outcomes that are congenial to nationalists. For the new nationalists’ grander claims to hold water, one would have to believe that not only *can* devolution serve nationalist ends, but that it *does* serve them—regularly, predictably, and well. The new nationalists cannot, in my view, defend this proposition simply by demonstrating that states now participate in nationwide political controversies on behalf of nationwide constituencies or work alongside federal lawmakers and officials in framing and implementing federal law.

¹⁴⁹ Bulman-Pozen, *supra* note 112, at 1925; *see also* Kramer, *supra* note 97, at 222 (noting that the political safeguards theory conflates two different things: “ensuring that national lawmakers are responsive to geographically narrow *interests*, and protecting the governance prerogatives of state and local *institutions*,” and explaining that federalism is ultimately concerned with the latter, while the safeguards theory speaks only to the former).

¹⁵⁰ *See* Gerken, *The New Nationalism*, *supra* note 10, at 1893 (“[F]ederalism can be a tool for improving national politics, strengthening a national polity, bettering national policymaking, entrenching national norms, consolidating national policies, and increasing national power.”).

¹⁵¹ *Id.* at 1890.

¹⁵² Bulman-Pozen, *supra* note 112, at 1956.

2. *Not Your Father's Federalism*

The new nationalists' apparent confidence that increased levels of devolution will serve nationalist ends, as well as their concomitant failure to explore nationalist downsides to the species of state empowerment they advocate, might be explained another way. In particular, one of the motivating premises of new nationalist thinking about state empowerment is that federalism today is quite different from what it was a generation (and certainly two generations) ago. This is true, Dean Gerken explains, because "[t]he sovereignty trump card wielded during the days of slavery and Jim Crow cannot be played anymore," and so the national government can find a way to regulate states if it wants to.¹⁵³ "The national government," Gerken insists, "can police federalism's worst excesses . . . while taking advantage of its best features."¹⁵⁴

Nationalists, Gerken argues, have been too slow to adapt to this reality.¹⁵⁵ They remain in "the bad habit of conflating 'Our Federalism' with your father's federalism"¹⁵⁶—which is to say nationalists continue to associate federalism with "racism, parochialism, and cronyism,"¹⁵⁷ and they still trade in the decades-old intuition that "if 'one disapproves of racism, one should disapprove of federalism.'"¹⁵⁸ Gerken regards this perspective as "outdated."¹⁵⁹ Modern federalism, in her view, "is largely sheared of its traditional trappings."¹⁶⁰

There are two things going on here, I think. First (and unmistakably), Gerken is arguing that the hazards associated with state dissent from national policy can typically be mitigated by the federal government at acceptable cost. "All the national majority needs to do," she explains, "is spend the political capital necessary to [bring a dissenting state in line]."¹⁶¹ Second, Gerken appears to be hinting that state violations of national laws, policies, and norms are not likely, under modern conditions, to be all *that* troubling.

¹⁵³ Gerken, *supra* note 112, at 1963.

¹⁵⁴ *Id.*

¹⁵⁵ Gerken, *The New Nationalism*, *supra* note 10, at 1890.

¹⁵⁶ Gerken, *supra* note 112, at 1963.

¹⁵⁷ Heather K. Gerken, *Distinguished Scholar in Residence Lecture: A User's Guide to Progressive Federalism*, 45 HOFSTRA L. REV. 1087, 1087 (2017).

¹⁵⁸ *Id.* at 1088 (quoting WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 155 (1964)).

¹⁵⁹ *Id.*

¹⁶⁰ Gerken, *supra* note 112, at 1963.

¹⁶¹ Gerken, *Exit, Voice, and Disloyalty*, *supra* note 121, at 1382.

It is not 1963 anymore, she seems to intimate, and “uncooperative” state behavior today is rather less worrisome than, say, George Wallace standing in the schoolhouse door or Bull Connor’s men wielding firehoses. Those images help constitute federalism’s “traditional trappings,” and Gerken’s point is that they no longer match our reality. Thus, your *father’s* federalism is the federalism of Jim Crow; yours is something more benign.

The basis for the first of these claims is that Congress now enjoys vast regulatory power and can extend its reach into most any realm of human activity and state policy.¹⁶² This, in turn, means that states cannot rely on their status as sovereigns to escape the control of the national government. And that means there is less cause to worry about the consequences of state defiance of federal law or policy.

But I do not think things are quite so simple. To begin with, as Gerken and Bulman-Pozen themselves emphasize, the mere fact that Congress has the constitutional authority to enact some policy does not mean the federal government possesses the tools necessary to enforce it effectively.¹⁶³ Moreover, as Professor Clark and others have emphasized, enacting federal law is no easy matter,¹⁶⁴ as the legislative process is structured in a way that enables political minorities to obstruct legislative change.¹⁶⁵ Gerken’s breezy assertion that “all the national majority needs to do” to overcome state resistance “is spend the [necessary] political capital” papers over these features of federal lawmaking and implementation.

But even if Gerken were right, and the national majority *could* typically “rein in federalism’s worst excesses” by enacting whatever measures are necessary to bring a defiant state to heel, it is far from clear that it should have to. It is far from clear, that is, that we should prefer a world in which states intermittently flout federal law or disrupt national policy, and the national majority responds by expending the resources necessary to bring

¹⁶² See Gerken, *supra* note 112, at 1992 (“Decentralization involves risks, particularly when it comes to political and racial minorities. But those risks are more easily managed in today’s world, where federalism is all but sheared of sovereignty. The national government is enormously powerful and involved in virtually every dimension of state and local policy. It is more than capable of protecting the members of our loyal opposition from members of our disloyal opposition.”).

¹⁶³ See Bulman-Pozen & Gerken, *supra* note 115, at 1267 (“While the federal government may threaten to administer a program itself if the state does not cede to its demands, its capacity to do so is often limited, and the state may call Congress’s bluff.”); *id.* at 1268 (“Having taken on the states as partners, the national government’s threat to exit becomes less credible. Moreover, the ongoing success of the program may depend on a healthy level of reciprocity.”).

¹⁶⁴ See *supra* note 53 and accompanying text.

¹⁶⁵ Clark, *supra* note 53, at 1339–40 & n.89.

them in line, to one in which states are zealous in their efforts to advance federal law and policy (or at least scrupulous in their efforts not to undermine it). Most of the exercises in dissent and defiance that the new nationalists celebrate take place against the backdrop of identifiable federal law and policy (else the behavior would not qualify as “dissent”);¹⁶⁶ and it is difficult to see why the price of state respect for such law and policy should be federal officials’ expenditure of political capital above and beyond what was necessary to bring that policy to life in the first place. It is true, as Gerken notes, that state-based dissent can “provid[e] ‘the democratic churn necessary for an ossified national system to move forward,’”¹⁶⁷ but she fails to address the risk that such dissent will churn our democratic system to a pulp by exposing settled national norms to perpetual challenge.

Consider, in this vein, the rules that govern Supreme Court review of state court judgments with respect to matters of federal law.¹⁶⁸ Although the Court lacks the capacity to police each and every state court error when it comes to the adjudication of federal claims, one could plausibly argue that the Justices are able to police those tribunals’ “worst excesses” along this dimension. Still, I don’t see anyone clamoring for state courts to give short shrift to Title VII claims or to under-deliver on Fourth Amendment protections in hopes of sabotaging federal law and policy. (Or, at least, no one is doing so on the ground that it makes for attractive federalism.) This is true, moreover, despite the fact that, by going their own way, state courts might advance some of the goals associated with the devolutionary side of our federal scheme. At least since *Martin v. Hunter’s Lessee*¹⁶⁹ was decided, there has been widespread agreement that our federalism frowns upon such things; and I see no reason to regard the uncooperative treatment of federal law by state executive and legislative officials—for which the new nationalists express considerable enthusiasm—more favorably than uncooperative treatment of federal law by state judges.

It is harder to know what to say about the hints in the new nationalist literature that “federalism’s worst excesses” under modern conditions just are

¹⁶⁶ See, e.g., Bulman-Pozen & Gerken, *supra* note 115, at 1276 & n.64 (noting that states “forced the EPA to back off of a strong regulatory position” by “resist[ing] the Clean Air Act’s requirement that they create inspection and maintenance programs to monitor emissions,” and declining to assess whether, in that particular instance or in general, we are better or worse off when states take advantage of their leverage in this way).

¹⁶⁷ Gerken, *The New Nationalism*, *supra* note 10, at 1895 (quoting Gerken, *All the Way Down*, *supra* note 121, at 10).

¹⁶⁸ See 28 U.S.C. § 1257 (2012). State court adjudication of federal claims is probably the oldest and most firmly entrenched species of cooperative federalism in the American system.

¹⁶⁹ 14 U.S. 304 (1816).

not as bad as the ones the country confronted during prior generations. If this is, in fact, part of what the new nationalists mean to intimate, the conclusion does not follow from the premise. For even if it is true that modern-day state defiance of national norms is neither so poisonous nor so subversive as the racially-oriented defiance that characterized Jim Crow, it remains the case that state empowerment and state defiance often continue to go hand-in-hand with the subordination of unpopular local minorities (including racial minorities) and politically disempowered groups. One need only consider, for example, the raft of strict voter identification laws that have recently been enacted by the states,¹⁷⁰ or instances of flagrant state-based defiance of the Supreme Court's decision recognizing same-sex couples' right to marry,¹⁷¹ to see that this is so. If one is worried about this sort of thing—about the likelihood that, even under modern conditions, devolution might enable the

¹⁷⁰ See, e.g., GA. CODE ANN. § 21-2-417 (West 2006) (requiring voters to present proper identification at the polls); 2011 Wis. Sess. Laws 103 (codified as amended in scattered sections of WIS. STAT.) (requiring voters to present approved photo identification in order to cast a ballot). To be sure, there is dispute among jurists as to whether some of these voter identification ("ID") laws in fact have a disparate impact on minority voters within the meaning of Section 2 of the Voting Rights Act. See, e.g., *Frank v. Walker*, 17 F. Supp. 3d 837, 895–97 (E.D. Wis.), *rev'd*, 768 F.3d 744 (7th Cir. 2014). I am persuaded by the views expressed by Judge Posner in his opinion dissenting from the denial of rehearing en banc in *Frank v. Walker*. There he noted that (1) "[t]here is only one motivation for imposing burdens on voting that are ostensibly designed to discourage voter-impersonation fraud, if there is no actual danger of such fraud, and that is to discourage voting by persons likely to vote against the party responsible for imposing the burdens," and (2) "[u]nless conservatives and liberals are masochists, promoting laws that hurt them, these laws must suppress minority voting." *Frank v. Walker*, 773 F.3d 783, 796–97 (7th Cir. 2014) (Posner, J., dissenting).

Dean Gerken's passing mention of the debate surrounding voter ID laws is telling. Gerken has argued that when states "dissent by deciding"—when they actually enact their dissenting viewpoints into law rather than simply voicing disagreement with federal policy or trying to change that policy through the federal legislative process—they create salient, attention-grabbing policy conflicts that stimulate valuable public discussion of the relevant issues. Gerken, *All the Way Down*, *supra* note 121, at 67. And she notes, by way of example, that "[d]isputes over vote[r] fraud garnered a lot more attention once state legislatures started passing voter ID laws." Gerken, *supra* note 112, at 1979. But state voter ID laws did not call attention to long-simmering disputes relating to voter fraud that had theretofore been invisible to the public. Rather, the enactment of these laws gave rise to widespread conflict relating to the veracity of claims of voter fraud advanced by supporters of these laws and claims of minority disenfranchisement advanced by their opponents.

¹⁷¹ See Alan Blinder, *Top Alabama Judge Orders Halt to Same-Sex Marriage Licenses*, N.Y. TIMES (Jan. 6, 2016), <https://www.nytimes.com/2016/01/07/us/top-alabama-judge-orders-halt-to-same-sex-marriage-licenses.html>. Roy S. Moore, the Alabama Chief Justice who had instructed state probate judges to defy the Supreme Court's holding relating to same-sex marriage, was subsequently suspended from the bench as a result of his actions. *Id.* And I do not doubt that, if state officials had failed to step in, the federal courts would have. This particular example, then, is not inconsistent with the new nationalists' instinct that the federal government possesses the necessary tools to bring defiant states in line. The question I am addressing just now, however, is whether we still have cause to worry that state pushback against federal laws and norms is likely, still, to involve especially troubling efforts to subordinate unpopular minorities.

oppression of vulnerable local minorities or seriously impede the enforcement of national law—then the federalism on offer in the new nationalist literature does not look new at all, and it certainly does not look nationalist.

III. IMPLICATIONS

I turn now to the inevitable question: So what? Why does it matter (*does it matter?*) that our constitutional discourse is neglectful of nationalism? I answer (equally inevitably) with some general reflections on the skewing of that discourse and some speculative thoughts about particular areas of legal doctrine that might look different if we routinely treated nationalism as a constitutional value capable of bearing real weight. My hope is that, if I have persuaded readers that our constitutional discourse is, in fact, askew, others will join me in the effort to determine how and where, exactly, an invigorated nationalist jurisprudence might have bite.

A. *De-constitutionalizing Nationalism: The Wages of Neglect*

Federalism counts as an important constitutional value; there's not much doubt about that. There has been vigorous debate, since the earliest days of the Republic, over the question of how, exactly, power is to be divided between the national government and the states. And since the middle of the twentieth century, courts and commentators have debated the question of what role the federal judiciary ought to play in policing the limits of national power. But there is consensus (or something very close to it) that federalism—like equality, liberty, the separation of powers, and so on—is a foundational constitutional value.

This has important consequences for how we talk and think about the concept.¹⁷² It means one can argue that a statute is invalid on the ground that it is inconsistent with the federal structure, or that some exercise of power by a government official is unlawful because it upsets the balance of power between the federal government and the states. It also makes it sensible to argue that a statute ought to be construed one way or another so as to avoid disruption to the federal system. Values that do not earn the label “constitutional” typically cannot support arguments such as these. More

¹⁷² See Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1081, 1083 (2013) (specifying an array of payoffs conventionally associated with attaching the label “constitutional” to some rule but going on to challenge the assumption that there is a fixed set of attributes that necessarily attach to concepts widely recognized as “constitutional”).

generally (and more nebulously), to say that a given value is “constitutional” is to assign to it a kind of fundamentality; it is a signal that our society is especially committed to advancing the value in question.¹⁷³

It would seem to matter a great deal, then, that the thing we call “federalism”—the concept that we all agree bears constitutional weight—is routinely described and deployed in a way that focuses only on devolution. To do so is to de-constitutionalize nationalism and, thus, to weaken nationalism’s capacity to exert force in the ways described above. Consider, in this vein, that while we are all familiar with rules of statutory interpretation that are designed to safeguard state power and autonomy,¹⁷⁴ it is more difficult to identify their nationalist counterparts. Similarly, while courts and commentators routinely assess the constitutionality of federal legislation by considering whether it will advance or inhibit our capacity to secure the benefits associated with devolution,¹⁷⁵ it is far less common for judges and scholars to consider the benefits of centralization when performing that calculus.¹⁷⁶

Indeed, it is not just that nationalism is often *forgotten* as a constitutional value; it is treated, at times, as if it were *at war* with constitutional values. Thus, when Dean Gerken tells us that “[f]ederalism . . . is the main competitor to nationalism,”¹⁷⁷ and Professor Bulman-Pozen describes federalism and nationalism as opposite sides of an equation,¹⁷⁸ they imply that nationalism stands outside of and is, indeed, antagonistic to our Constitution’s vision of government structure (since “federalism” is the label we attach to that vision).¹⁷⁹ Nationalism, on these accounts, might be the stuff of political theory or, perhaps, social and economic exigency; but

¹⁷³ See *id.* at 1081.

¹⁷⁴ See *supra* Section I.A.

¹⁷⁵ See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

¹⁷⁶ This is not to say that consideration of the benefits associated with centralization is entirely absent from our constitutional law. It does plenty of work, for example, in connection with dormant Commerce Clause doctrine. See, e.g., *Cooley v. Bd. of Wardens*, 53 U.S. 299, 319 (1851) (explaining that some subjects “imperatively demand[] a single uniform rule, operating equally on the commerce of the United States in every port” and that such subjects “may justly be said to . . . require exclusive legislation by Congress”). It also does work in an array of cases relating to the duties states owe one another. See Gil Seinfeld, *Reflections on Comity in the Law of American Federalism*, 90 NOTRE DAME L. REV. 1309, 1314–23 (2015) (surveying cases and commentary relating to the Privileges and Immunities Clause, the Full Faith and Credit Clause, and the Extradition Clause and noting the emphasis on the union-reinforcing goals underlying these provisions). The point is that the constitutional interest in centralization seems not to serve as a counterweight to the interest in devolution when courts are called upon to assess the legitimacy of federal law.

¹⁷⁷ Gerken, *supra* note 112, at 1967.

¹⁷⁸ See Bulman-Pozen, *supra* note 112, at 1923.

¹⁷⁹ See also Vázquez, *supra* note 58, at 1611 (noting that “the Constitution reflects a careful balance of federalism and nationalism”).

whatever it is, it is exogenous to our constitutional law.

B. Nationalist Jurisprudence

It is easy to say (and easy to see) that neglect for nationalism has important consequences for how we talk and think about our federal system. It is a harder thing to figure out just when that neglect has tangible consequences for particular legal doctrines. I am inclined to think that the practical effect of our failure fully to develop a constitutional law of nationalism is pervasive. We are dealing here with the shape of foundational constitutional concepts, and it is reasonable to think that most every question relating to the constitutionally proper allocation of power between the federal government and the states might look at least a little different if we were accustomed to treating nationalism as a full partner to devolution in the pantheon of constitutional values. In this Part, I briefly examine three areas in connection with which this is especially likely to be true.

The obvious place to start is with the presumption against preemption, which I examined in detail in Section I.A. The Supreme Court has justified the presumption by reference to “federalism concerns” and to states’ status as “independent sovereigns in our federal system.”¹⁸⁰ But it should be clear by now that claims such as these can only be the beginning, not the end, of an argument about how to resolve ambiguities relating to the preemptive reach of federal law.

What the Justices must be saying, if they are thinking about the matter clearly, is that preemption raises “federalism concerns” not because compromising state autonomy is necessarily problematic from a federalism perspective, but because, under a contingent set of conditions that happen to describe federal-state relations at this point in our history, there is reason to fear that preemption, as a general matter, is either reflective of, or likely to contribute to, some sort of constitutional pathology. Of course, if this is the instinct motivating the presumption, it is one that requires defending. And a compelling defense of that proposition requires careful attention to the nationalist features of our constitutional order and, in particular, sensitivity to the fact that an unduly narrow construction of federal law might raise a “federalism concern[.]” in its own right. That attention and sensitivity, we have seen, is missing from the relevant case law and, in large part, from the academic commentary as well.

¹⁸⁰ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

To be sure, it seems likely that anyone prepared to endorse the presumption on grounds of some inchoate “federalism concern[.]” will be sympathetic to a narrower, potentially more nuanced argument that the particular qualities of modern American federalism call for safeguards against unnecessary or excessive preemption. To the extent that is true, thrusting nationalism into the relevant discourse might not move the needle. But it is not too much to hope, I think, that in the transition from a regime that is justified by way of little-scrutinized, only-halfway-accurate assertions about what our federalism just *is*, to one that confronts and grapples with the dual character of federal systems, we might come to see some features of this landscape in a new light.

A second set of cases that has been affected by our neglect of nationalism is one I have elsewhere labeled the “jurisprudence of union.”¹⁸¹ As to this body of case law, the problem is not so much that neglect of nationalism has led the Court to craft doctrine that cannot be defended; it is that the defenses proffered by the Court for the doctrine it has propounded are the wrong ones. In other words, the limits of our imagination and vocabulary when it comes to the nationalist features of our federal system have caused the Court to eschew sound justifications for these pockets of doctrine in favor of defenses that are transparently weak.

The best example comes from the case law relating to state courts’ obligation to adjudicate federal causes of action. Those cases hold that state courts are required to entertain federal claims unless they have a “valid excuse” for refusing to do so; and they specify, further, that a valid excuse is one “reflect[ing] the concerns of power over the person and competence over the subject matter.”¹⁸² This means that a state cannot close its courthouse doors to a federal cause of action if those doors are open to similar causes of action arising under state law, and that states cannot deprive their courts of jurisdiction over a set of federal claims just because they disagree with the underlying federal policy.¹⁸³

¹⁸¹ See generally Gil Seinfeld, *The Jurisprudence of Union*, 89 NOTRE DAME L. REV. 1085 (2014).

¹⁸² *Haywood v. Drown*, 556 U.S. 729, 739 (2009) (quoting *Howlett v. Rose*, 496 U.S. 356, 381 (1990)).

¹⁸³ *Id.* at 739–41. Thus, a state family court could, without constitutional difficulty, refuse to hear a Title VII claim (since, presumably, employment discrimination claims fall outside the subject matter competence of the court). But a civil court of general jurisdiction could not do so, since those courts presumably entertain employment discrimination claims that arise under state law (thus making it impossible to argue that such cases fall outside the subject matter competence of the court). Nor could a state legislature fence all employment discrimination claims (state *and* federal) out of its courts on the ground that it thinks workplace discrimination ought not to be actionable.

What is remarkable about the decisions that establish and develop these rules is how poorly theorized they are. The Justices have repeatedly insisted that states' obligation to entertain federal causes of action derives from the Supremacy Clause.¹⁸⁴ They have explained, more specifically, that the problem with state jurisdictional rules that run afoul of the doctrine of valid excuse is that they "undermine federal law"¹⁸⁵ and threaten to "nullify . . . federal right[s]."¹⁸⁶ As I have explained elsewhere, however, this handwringing about the nullification or undermining of federal law is generally unwarranted.¹⁸⁷ When a federal claim is dismissed from state court for want of jurisdiction, the plaintiff remains free to re-file in some other tribunal (most likely a federal district court). And it is difficult to see how a jurisdictional rule that poses no formal obstacle—and, in the vast majority of cases, no practical obstacle—to the vindication of a plaintiff's federal claim can be said to "nullify" or "undermine" the federal law at issue. Hence, this important feature of our federal system—state courts' obligation to entertain federal causes of action—has been justified in terms that are not up to the task.

A better justification for the limits on state jurisdictional autonomy recognized in these cases would sound not in federal supremacy, but in a value best described as "union." The idea is that state courts' duty to entertain federal causes of action is not an expression of the subordinate status of state law (or, more controversially, state governments), but an entailment of the states' decision to come together and form a single nation. It is an expression of the idea that member states must take ownership of national law—that they must treat federal law as something they are bound *to*, not just something they are bound *by*.¹⁸⁸ The case law gestures in this direction from time to time, but the idea never receives sustained attention, and it plays second fiddle, at best, to the supremacy-oriented claims outlined above.¹⁸⁹

The Court's reasoning in these cases (especially the most recent and important case in this line¹⁹⁰)—its instinct to reach for a dubious supremacy-based justification when an account focused on union would make more sense—reflects the narrowness of our thinking when it comes to the

¹⁸⁴ See *id.* at 736; *Testa v. Katt*, 330 U.S. 386, 394 (1947).

¹⁸⁵ *Haywood*, 556 U.S. at 739.

¹⁸⁶ *Id.* at 736; see also *id.* at 741 n.8 (insisting that state court dismissal of federal causes of action "burden[s]" and threatens to "thwart [the] enforcement" of federal causes of action).

¹⁸⁷ Seinfeld, *supra* note 181, at 1094–97; see also *Haywood*, 556 U.S. at 766, 769 (Thomas, J., dissenting).

¹⁸⁸ Seinfeld, *supra* note 181, at 1103.

¹⁸⁹ See *id.* at 1099–1105 (offering a detailed account of the role played by supremacy and union in the case law relating to state courts' obligation to entertain federal claims).

¹⁹⁰ *Haywood*, 556 U.S. 729.

nationalist side of our federalism.¹⁹¹ My point is not that the questions raised by these different bodies of doctrine would all of a sudden seem straightforward if only, instead of relying on ill-conceived claims about the supremacy of federal law, we resolved to talk the talk of “union” (or perhaps just “nationalism”). The question of how to strike the proper balance between the interests in state autonomy and national empowerment would remain and, in many instances, it would remain difficult. The point is that these cases are an outgrowth (and a further example) of the phenomenon explored in Parts I and II of this Article—they reflect our failure to explore and develop the constitutional law of nationalism. Were we in the habit of treating nationalism as an independent, multifarious, and weighty constitutional consideration—were we accustomed to carefully considering the benefits thought to flow from our status as a nation and the legal rules necessary to secure those benefits—we would be better able to identify and reason about the values at stake across these bodies of doctrine.

This is true, too, in connection with the case law recognizing limits on Congress’s authority to commandeer state executive and legislative branch officials. As is well known, in *New York v. United States*¹⁹² and *Printz v. United States*,¹⁹³ the Supreme Court held that “[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers . . . to administer or enforce a federal regulatory program.”¹⁹⁴ The holdings in the two cases are grounded squarely in considerations of federalism, yet neither majority opinion says much of anything about the nationalist side of the balance.

To some extent, this is unremarkable. The statutes under review compromised the autonomy of state officials, so of course the opinions focus principally on considerations of state sovereignty. But the impression one gets from reviewing these decisions is that constitutional nationalism is simply what is left over after we identify the necessary scope of state sovereignty and autonomy.¹⁹⁵ We figure out, first, what powers and immunities the states must have if they are to serve their constitutionally designated functions; and

¹⁹¹ As I have explained elsewhere, this is not an isolated event. The same dynamic—*i.e.* the tendency to cram state-autonomy-constraining constitutional rules within the framework of supremacy—plays out in other areas as well. *Id.* at 1105–16 (exploring a union-oriented justification for features of the law of intergovernmental tax immunity and foreign affairs preemption).

¹⁹² 505 U.S. 144 (1992).

¹⁹³ 521 U.S. 898 (1997).

¹⁹⁴ *Id.* at 935; see also *New York*, 505 U.S. at 188.

¹⁹⁵ See *New York*, 505 U.S. at 156–57.

we determine the reach of federal power, and assess the legitimacy of federal law, by reference to that vision.¹⁹⁶ It seems, once again, that we could just as easily run the analysis the other way. That is, we might inquire, first, what powers Congress must have if the national government is to serve its intended purposes, and then define the reach of national power (and the residual sphere of state autonomy) in light of that calculus. We might, but (in these cases, at least) we do not.¹⁹⁷

To be sure, there is repeated mention in *New York* of Congress's constitutionally enumerated powers (the Commerce and Spending powers in particular);¹⁹⁸ and *Printz* offers token consideration of the Necessary and Proper Clause as well.¹⁹⁹ But while the devolutionary side of our federalism is treated (in these opinions and so many others) as if it were greater than the sum of its textual parts, the nationalist side is not. The opinions signal that there is an idea of state sovereignty—a structural commitment that cannot be reduced to any particular constitutional clause or group of clauses—that is capable of driving the interpretation of federal law or even requiring its invalidation. But there is no parallel conception of national power working in these cases to prevent it.

Even the dissenting opinions in *New York* and *Printz*—which of course reject the vision of federalism advanced by the majority—do not rely on an affirmative vision of our constitutional nationalism to support the conclusions they offer. Those opinions acknowledge the nationwide scope of the social problems addressed by the statutes under review,²⁰⁰ and they insist that

¹⁹⁶ *Id.* at 157 (“The Tenth Amendment . . . directs us to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power.”). To be clear, I have no objection to the notion that we ought to consider the consequences for state sovereignty of authorizing some exercise of federal power. My objection is to our practice of treating that question as the *only* relevant question from the perspective of our constitutional federalism. The *New York* Court reduces “[t]he benefits of th[e] federal structure” to those associated with devolution and does not consider the benefits associated with centralization. *Id.* (relying on *Gregory v. Ashcroft* and other canonical sources for a catalog of the benefits associated with federalism despite those sources focusing only on the benefits associated with devolution).

¹⁹⁷ I am not objecting to the Court's observation in *New York* that the question of whether some federal statute falls within Congress's enumerated powers is a mirror image of the question whether that statute invades the sphere of state autonomy protected by the Tenth Amendment. *Id.* at 156. I am objecting to the fact that, when the Court endeavors to determine the extent of national power and state autonomy, it largely ignores the functional reasons for establishing a nation as opposed to a loosely bound confederation like the one that prevailed prior to ratification of the Constitution.

¹⁹⁸ *See id.* at 156–59.

¹⁹⁹ *Printz*, 521 U.S. at 923–24.

²⁰⁰ *See id.* at 939–41 (Stevens, J., dissenting) (noting that Congress “act[ed] on behalf of the people of the entire Nation” in addressing a national “epidemic of gun violence” (internal quotation marks

Congress's enumerated powers are capacious enough to support the federal government's efforts.²⁰¹ But they make no real effort to explain *why* our Constitution confers the relevant powers on the national government. In these opinions, too—and, again, in sharp contrast to the way judges across the ideological spectrum reason about the devolutionary side of our federalism—it is as if the enumerated powers live in isolation from one another and bear no relationship to any holistic theory of when centralization might be attractive and what it might be good for.²⁰²

CONCLUSION

Nationalism is a poorly understood, erratically invoked constitutional value. It does work in cases relating to the dormant Commerce power, and it forms part of the backdrop to cases that take an aggressive approach toward federal preemption of state law, but in the many ways canvassed in this Article, the concept is badly neglected. I suspect that, to one degree or another, one of the points flagged in Part II—the notion that federalism today is vastly different from what it was many years ago—underlies all the varied species of neglect surveyed here. There is no doubt of the notion's truth, or of the importance of adapting our understanding and study of federalism with the relevant differences fully in view. But with the vast

and citation omitted)); *New York*, 505 U.S. at 195 (White, J., concurring in part and dissenting in part) (“[T]he 1980 and 1985 statutes were enacted against a backdrop of national concern over the availability of additional low-level radioactive waste disposal facilities.”); *see also id.* at 206 (“We face a crisis of national proportions in the disposal of low-level radioactive waste . . .”).

²⁰¹ *Printz*, 521 U.S. at 941 (Stevens, J., dissenting) (“Article I, § 8, grants Congress the power to regulate commerce among the States. . . . [T]here can be no question that that provision adequately supports the regulation of commerce in handguns effected by the Brady Act.”); *New York*, 505 U.S. at 211 (White, J., concurring in part and dissenting in part) (“The notion that Congress does not have the power to issue ‘a simple command to state governments to implement legislation enacted by Congress’ is incorrect and unsound.” (internal citation omitted) (quoting *id.* at 176 (majority opinion))).

²⁰² The closest we get to this is a two-paragraph section of Justice Stevens’s opinion in *Printz* that emphasizes the states’ duty to treat federal law as their own. *See Printz*, 521 U.S. at 944 (Stevens, J., dissenting). As I have explained elsewhere, this discussion is consistent with the notion that “union” is an independent, nationalist value that exerts real force in our constitutional law. *See Seinfeld, supra* note 181, at 1136 n.224. But the opinion does nothing to develop the idea. Indeed, it does not discuss anything remotely resembling these terms, which actually tends to reinforce the notion that this sort of thinking is so foreign to our constitutional discourse that the Justices do not even recognize when they are doing it. Justice Breyer’s opinion in *Printz*, meanwhile, helpfully frames the question presented as an exercise in “reconcil[ing] the practical need for a central authority with the democratic virtues of more local control.” *Printz*, 521 U.S. at 976 (Breyer, J., dissenting). So he at least acknowledges that there are general, practical considerations that militate in favor of centralizing power. But that observation is about all we get out of his opinion on the subject.

growth in federal regulatory power and activity over the years, and with the passage of time since the excruciatingly ugly exercises of state power that characterized Jim Crow, our thinking about constitutional nationalism has fallen into a state of torpor.

The consequences of this neglect are uncertain. I have identified areas of doctrine that seem to be warped by it, but I am inclined to think that assessing consequences in these terms misses the point to some extent. It fails to capture how deeply and pervasively this neglect shapes our thinking about what federalism is. As I noted at the outset, law students, lawyers, judges, and academic commentators now routinely use the term “federalism” as if it were synonymous with “devolution.”²⁰³ Indeed the practice is so widespread that it is tempting to suggest that, at this point, “federalism” just *means* “states’ rights” or “state empowerment,” since that is the way the term is used—uncritically and more or less uncontroversially—by well-socialized lawyers. If this is the case, then it is worth taking notice. For this is not federalism *as the* new nationalism; it is federalism *without* nationalism. And that is a new species of federalism indeed.

²⁰³ I suspect that the misconception is attributable not only to the dynamics described in this Article, but to conservative legal thinkers’ successful appropriation of the term through the naming of *The Federalist Society*. The group’s commitment to the preservation and promotion of state autonomy has generated a powerful association between that commitment and the term “federalist,” thus obscuring the two-sided nature of the governance model and constitutional concept that go by the same name.